11,391

1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 217.

THOMAS J. HOLLINGSWORTH, PLAINTIFF IN ERROR,

vs.

JOHN T. FLINT AND B. R. CHAMBERLAIN,

PHILADELPHIA BAR ASSOCIATION

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TEXAS.

FILED OCTOBER 3, 1877.

Transcript

of

Record.

1879

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October Term

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1 THOMAS J. HOLLINGSWORTH, PL'FF IN error,
vs.
JOHN T. FLINT & D. T. CHAMBERLIN, DEF'TS in error.

Be it remembered, that at a term of the circuit court of the United States, 5th circuit, in and for the western district of Texas, at Austin, sitting for the January term, A. D. 1877, among other the following proceedings were had:

THOMAS J. HOLLINGSWORTH, PL'FF,
vs.
JOHN T. FLINT & D. T. CHAMBERLIN, DEF'TS. } No. 1579.

2 The petion is endorsed, to wit:

THOMAS J. HOLLINGSWORTH
vs
JOHN T. FLINT, D. T. CHAMBERLAIN.

This action is brought as well to try title as for damages.

F. W. CHANDLER,
BETHEL COOPWOOD,
L. P. CUNNINGHAM,
Att'ys for Pl'ff.

Filed Dec'r 12, 1874.

M. HOPKINS, *Clk.*

Which is in words following, to wit:

Petition.

In the circuit court of the United States for the western district of Texas, holding sessions at Austin, January term, 1875.

To the honorable judges of said court:

Your petitioner, Thomas J. Hollingsworth, a resident citizen of the county Vanderburg, and State of Indiana, brings this suit as plaintiff, and files this petition against John T. Flint and D. T. Chamberlain, defendants, who are resident citizens of the western district of Texas, to wit, in the county of McLennan,

And for cause of action states that heretofore, to wit, on the 18th day of September, A. D. 1872, he, the plaintiff, was the owner of and seized in fee and in the possession of the following-described
3 tract of land, situated in the counties of Bell, Milam, and Williamson, in the western district of Texas, and described as follows: Eleven leagues of land granted to or in the name of Miguel Davila, and bounded substantially as follows, to wit: Situate on the right or south bank of the San Andres River at the place where Buffalo Creek and Donahoe's Creek empty in said river, its boundaries, limits, and landmarks being as follows: Beginning at a stake set on the edge of a bluff or ravine from which four varas N. 59° W. is a white oak 18 inches in diameter; thence south 20° W. 19,600 varas, crossing Clay and Alli-

gator Creeks, as is represented on the map, to the northeast corner of a tract of six leagues, surveyed for Pedro Zarza, the same being a stake from which 382 varas south 20° W. is a mesquite 8 inches in diameter; thence north 70° W. 13,750 varas, following the north line of said Zarza tract to the northeast corner of the same, which is a stake set in an earth mound in the prairie; thence north 20 E. 20,350 varas to said river at a stake, from which five varas S. 53 E is a hackberry and eleven varas north is a pecan; thence down the river in all its meanders back to the beginning, comprising two hundred and seventy-
4 five million square varas, more or less.

Plaintiff further alleges that, being seized in fee and possessed as aforesaid of said tract of land, the said defendants, on or about the 31st day of October, A. D. 1873, with force and arms, entered upon and took forcible possession of said tract of land and ejected petitioners therefrom, and with force and arms held forcible possession of the same, and refuse to deliver the possession to the petitioner, although often demanded of them.

And the said defendants have since the date last aforesaid, and still do, with force and arms as aforesaid, continue to hold possession of said tract of land, with the buildings, houses, and improvements thereon, and to appropriate to their own use and benefit the rents, issues, and profits of the same of the value of fifty thousand dollars. That defendants are indebted to the plaintiff in said sum of money, and that it has long since been due and payable, and that defendants have not paid the same or any part thereof, although often demanded of them.

The premises considered, the plaintiff prays for the issuance and service of legal process upon said defendants, and on the final
5 hearing hereof that plaintiff may have judgment for said land and premises, together with his damages sustained by reason of the wrongful ouster and possession of the said defendants, and for the rents and profits herein claimed, and for a writ of possession for said land, and a judgment for all costs in this behalf expended, etc.

The defendants will also take notice that the petitioner files herewith the following title-papers:

1st. A certified copy of a concession for the above-described lands from the State of Coahuila and Texas to Miguel Davila of 30th July, 1830.

2nd. A deed of conveyance for the same lands from Miguel Davila to James Hewetson, bearing date 7th of May, 1839.

3rd. A deed for the same lands from Maria Ines Davila and Abalo Valdez lo James Hewetson, bearing date 28th September, 1869.

4th. A deed from James Hewetson, Margaret Hewetson, Honora Hewetson, Bridget Maria Jenks, and Joseph C. Jenks for said lands to Bethel Coopwood, Barnes Parker, Frances M. Chandler, Thomas J. Hollingsworth, and Henry A. Lewis, dated the 18th day of September, A. D. 1873.

F. W. CHANDLER,
BETHEL COOPWOOD,
L. P. CUNNINGHAM,
Atty's for Plaintiff

6 Process issued December 1st, 1874.

And afterwards, to wit, on the 2d day of January, A. D. 1875, the following disclaimer was filed, endorsed to wit: No. 1579. Thos. J. Hollingsworth vs. John Flint. Disclaimer of John T. Flint. Filed January 2, 1875. M. Hopkins, cl'k.

Which is in words as follows:

Disclaimer of John T. Flint.

Suit pending in the United States circuit court for the western district of Texas, holding sessions at Austin.

THOMAS J. HOLLINGSWORTH } No. 1579.
vs.
JOHN T. FLINT ET AL. }

Now comes John T. Flint, one of the defendants in the above entitled and numbered cause, and disclaims having any title to or possession of the lands in controversy or any part thereof, nor had he any such title or possession to the same or any part thereof at the institution of this suit; wherefore he prays that he may be allowed to go hence with his costs, and will ever pray, &c.

JOHN T. FLINT,
Pro Se.

And afterwards, to wit, on the 8th day of January, 1875, the following demurrer and answer was filed, endorsed, to wit:

7 U. S. circuit court, west. dist. Texas, Austin. Law. Hollingsworth vs. Flint. 1579. Demurrer & answer of Chamberlain. Filed Jan'y 8th, 1875. M. Hopkins, cl'k. H. W. & N. for deft.

Which is in words as follows:

Demurrer & answer of D. T. Chamberlain.

U. S. circuit court, west. dist. Texas, Austin.—Law.

THOS. J. HOLLINGSWORTH }
vs.
JNO. T. FLINT ET AL. }

And now comes D. T. Chamberlain, defendant in the above-entitled cause, and says that the matters and things alleged in said petition are insufficient in law for plaintiff to have and maintain his said action, and of this he prays the judgment of the court, &c.

And should the above demurrer be overruled, said defendant says he is not guilty of the wrongs and trespasses alleged, and denies each and every allegation thereof, and of this puts himself on the country.

D. W. CHAMBERLAIN, *Deft.*

8 And afterwards, to wit, on Jan'y 8th, 1875, the following order appears:

Continued on affidavit of defendants.

And afterwards, to wit, on June 19th, 1875, the following order appears:

Continued as on affidavit of defendants.

And afterwards the following order appears:

January 26th, A. D. 1876. Leave to defendant Chamberlain to amend.

And *the* thereupon the amended plea was filed, endorsed, to wit, No.

1579. Thos. J. Hollingsworth vs. John T. Flint & David T. Chamberlain. Amended pleas and special defences of Chamberlain. Filed January 26th, 1876. M. Hopkins, clerk.

Which is in words, to wit:

Amended pleas, D. T. Chamberlain.

Suit pending in the circuit court of the United States, at Austin, for the western district of Texas.

THOS. J. HOLLINGSWORTH
vs.
JOHN T. FLINT AND DAVID T. CHAMBERLAIN. } No. 1579.

And for further plea in this behalf, as amendment to the pleas heretofore filed, leave of the court being first had, comes the said David T. Chamberlin, defendant, and says that the said plaintiff ought
9 not to have and maintain his aforesaid action thereof against him, because he says that he and those whose estate he has have had and held open, notorious, peaceable, continuous, uninterrupted, and exclusive adverse possession of the lands and tenements as set out and described by metes and bounds in said plaintiff's petition, which said description is herein adopted to show the full extent of this defendant's claim, this defendant claiming the same under deeds duly registered, and cultivating, using, and enjoying the same, and paying all taxes due thereon for a period of more than five years exclusive of the time that the statute of limitations did not run next before the commencement of this suit, and this he is ready to verify, &c.; wherefore he prays judgtment if the said plaintiff ought to recover, &c.

D. T. CHAMBERLIN,
Pro Se.

And for further amendment and plea in this behalf, the said defendant says that the said plaintiff ought not to have and maintain his said action against him, because he says that he, claiming to be the true and lawful owner thereof, has had and held open, notorious, peaceable,
10 continuous, exclusive, adverse, and uninterrupted possession of the entire lands and tenements and premises as claimed and described in plaintiff's petition for more than ten years next before the commencement of this suit, and that the said plaintiffs, for the said term of ten years, hath not made entry thereon; wherefore, by reason of said plaintiff's non-entry on said land and premises as aforesaid, he is forever barred of his right of recovery against this defendant, and this he is ready to verify, &c., and prays judgment if the said plaintiff ought to maintain his said action against him.

D. T. CHAMBERLIN,
Pro Se.

And for further plea and amendment in this behalf, this defendant says, avers and suggests to the court that he and those persons whose estate he has in the aforesaid lands and premises as described in plaintiff's petition have had and held open, notorious, peaceable, continuous, exclusive, adverse and uninterrupted possession of the same in good faith, entering and claiming under title deeds duly recorded, which he believes to be good and sufficient for more than one year next be-
11 fore the commencement of this suit, and that he and those persons

whose estate he has have made permanent and valuable improvements, of the value of ten thousand dollars, on the aforesaid land and premises, during the time he and they have had such possession of the same, and this he is ready to verify; wherefore he prays judgment for the value of the improvements aforesaid, &c.

D. T. CHAMBERLIN,
Pro Se.

And for further amended plea in this behalf, the said defendant says that the said plaintiff ought not to have and maintain his aforesaid action thereof against him, because he says that he, claiming to have good and perfect right and title thereto, has had and held open, notorious, peaceable, continuous, exclusive, and uninterrupted adverse possession of the said lands and tenements claimed in said plaintiff's petition, cultivating, using and enjoying the same for a period of more than ten years next before the commencement of this suit, exclusive of the time the statutes of limitation did not run, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have his said action against him, &c.

D. T. CHAMBERLIN,
Pro Se.

12 And for further amended pleas in this behalf by the said defendant, David T. Chamberlin, making special defenses to a portion of the land claimed in plaintiff's petition, he says that the said plaintiff ought not to have and maintain his aforesaid action thereof against him as to the lands described below, because he says that he has had and held adverse, open, notorious, peaceable, continuous, uninterrupted, and exclusive possession under color of title from and under the State of Texas, and the sovereignty of the soil, of a portion of the lands and tenements claimed in part, but not in whole, in said plaintiff's petition, described as follows, to wit:

The following described tract of land, situate near the boundary line between Bell and Milam Counties, in said State of Texas, on the south side of Little River, the same being a parcel of the George Dougherty head-right league, to wit: Beginning at a stake from which a mesquite bears S. 20° W. 5 v's, on elm N. 54° E. 25¾ v's, the N. W. corner of a tract of 457 acres out of said league, conveyed by A. W. Sulli-
13 van to S. G. Leatherman, June the 7th, 1854; thence S. 71° E. 1,409 varas to the N. E. corner of a tract out of said league, conveyed June 7th, 1854, by the said Sillivan to Nathaniel Shields, a stake from which an elm b'rs S. 61° W. 8 v's, and a hackberry bears S. 73½ W. 6½ v's; thence N. 19° E., with the division line of said league between said Sillivan and David Alexander to Little River; thence up the said river with its meanders to the N. E. corner of William Reed's ¼ league, the same being the N. W. corner of said Dougherty league; thence S. 19° W. with the next boundary line of said Dougherty league to the place of beginning, containing by estimation 1,107 acres of land, for more than three years next before the commencement of this suit, and this he is ready to verify; wherefore he prays judgment if the said plaintiffs ought to have and maintain his aforesaid action thereof against him, &c.

And for further amended pleas in this behalf, this defendant says that the said plaintiff ought not to have and maintain his aforesaid action thereof against him as to the lands described last above in this
14 answer, because he says that he and those whose estate he has,

has had and held open, notorious, peaceable, continuous, uninterrupted and exclusive adverse possession of the same, the said lands and tenements last described above, claiming the same under deeds duly registered, and cultivating, using, and enjoying the same, and paying all taxes due thereon for a period of more than five years, exclusive of the time the statute of limitation did not run, next before the commencement of this suit, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to recover the above described lands or any part thereof, &c.

And for further amended plea in this behalf, this defendant says that the said plaintiff ought not to have and maintain his aforesaid action thereof against him as to the lands described above in these special amended answers, because he says that he, claiming to have good and perfect right and title thereto, has had and held open, notorious, peaceable, continuous, exclusive, and uninterrupted adverse possession of the lands and tenements claimed and described above in these special
15 answers, cultivating, using, and enjoying the same for a period of more than ten years, exclusive of the time the statutes of limitation did not run, next before the commencement of this suit, and this he is ready to verify; wherefore he prays judgment if the said plaintiff ought to have his said action against him for the lands described in these special answers.

T. T. CHAMBERLIN,
Pro Se.

And afterwards, to wit, February 17th, 1876, continued on affidavit of def't Chamberlin.

And afterwards, to wit, March 1st, 1877, leave to defendants to amend. Whereupon the following was filed:

Endorsed, to wit: No. 1579. Hollingsworth vs. Flint & Chamberlain. Plea of limitation amended. Filed March 1st, 1877. M. Hopkins, cl'k.

Which is in words following:

2d amended pleas of def't.

HOLLINGSWORTH
vs.
FLINT AND CHAMBERLAIN.

In the U. S. circuit court, western district of Texas, holding sessions at Austin.

Now come the def'ts, by his att'y, and leave of the court being had, amend his pleadings in this cause as follows, to wit:

16 Def't says he does not own or claim to own or to have any interest, right, or title to the following-described land, it being part of the land sued for by pl'ff, viz:

1. Twenty-two hundred and fourteen acres, beginning at the N. E. corner of league No. 1, which is also the N. W. corner of a league granted by the government to Jessee Mumford, at a stake from which a hackberry 8 inches in diameter b'rs S. 14° E. 2 v's, an ash 15 inches diameter bears N. 84 W. 5 v's; thence S. 19° W. 10,091 v's to a stake for corner; thence S. 71° E. 1,200 v's to a stake for corner in the back line of s'd Jessee Mumford league; thence N. 19° E. 10,470 v's to the San Andres or Little River; thence up the river with its meanders to the

place of beginning, the same being the west or upper half of the said Jesse Mumford league.

2. Also, forty-four hundred and twenty-eight acres of land granted by the government to David Mumford, and known as the David Mumford league, beginning at the N. E. corner of a quarter of a league No. 1, in the name of Thomas A. Graves, a stake from which a hackberry 7 inches in diameter bears N. 86 W. 9 v's, and an ash 10 inches in diameter bears S. 89 E. 4 v's; thence S. 19 W. 4,927 v's to the S. E. corner
17 of s'd quarter of a league, a stake, from which an oak 15 in. dia. b'rs S. 47½ W. 16½ v'r's, & an elm 12 in. dia. b'rs S. 50 E. 11 v's; thence N. 71 W. 1,250, to the S. W. corner of s'd quarter league, an oak 12 in. dia., marked for corner; thence S. 19 W. 3,180 v's, Donaho's Creek, 4,146, a stake for S. W. corner, from which an elm 6 in. dia. b'rs N. 18 W. 32 v's; thence S. 71 E. 1,300 v's, a small creek at 3,750 v's, a stake for corner of s'd league, from which an oak 15 in dia. b'rs S. 11 W. 16 v's, & an elm 8 in. dia. b'rs S. 57 W. 14 v's; thence N. 19 E. 1,620 v's, cross a small creek at 1,720, cross Donaho's Creek at 6,736, made a corner on a hackberry 15 in. dia. marked for corner; thence with the meanders of the river to the place of beginning.

3. Also, 2,467 acres of land, part of a league patented to Joel Moore in two tracts or bodies, as follows: First begins at the N. W. corner of s'd Moore league or Little River, a hackberry, 15 in. dia.; thence S. 19 W. 6,307 v's, with s'd Moore's upper line, to a pile of rocks in the prairie; thence S. 70 E. 1,981 to corner from which a post oak 12 in. dia. b'rs N. 86½ E. 7 v's, & another 10 in. dia. b'rs S. 54 W. 8 v's; thence N. 19 E. 4,498 v's to a stake for corner; thence N. 71 W. 1,435 v's to a stake for corner; thence N. 19 E. 1,809 v's, more or less, to Little River; thence up said river with its meanders to beginning, containing
18 1,667 acres. The second begins at the S. E. corner of said Moore league, a stake from which a post oak 10 in. dia. b'rs S. 57 W. 6 v's, and another 10 in. dia. b'rs N. 62 E. 2½ v's; thence N. 19 E. with the lower line of s'd league 2,909 v's to a stake, from which a blackjack b'rs N. 20 W. 4 v's, & a small post oak b'rs N. 35 E. 5 v's; thence N. 70 W. 1,552 v's to stake, from which a post oak 15 in. dia. b'rs N. 13 W. 6¾ v's, and another 6 in. dia. marked + b'rs N. 60 E. 5 v's; thence S. 20 W. 2,909 to a stake in the back line of s'd Moore league; thence S. 70 E. 1,552 v's to beginning; all which said several tracts or parcels of land are situated upon the Miguel Davila 11-league grant, in Milam, Bell, & Williamson Counties, Texas, and a part of the land sued for by pl'ff. And def't say' that he does not now claim s'd lands described above, and have not claimed the same, or any part thereof, since about the year 1860.

And def't further says that he & those whose estate he has, have had and held the peaceable, actual, adverse, continued, and exclusive possession of the land sued for and described in pl'ffs petition (save
19 & except the land above quit-claimed and described), cultivating, using, and enjoying the same, and paying taxes thereon, and claiming under a deed duly registered for more than five years before the institutiot of this suit, wherefore he says he has full title for s'd lands, precluding the claim of pl'ff; and he says that his title to said land was fully perfected under the statutes of limitation long before pl'ff instituted his suit.

And def't says that he has had and held the actual, peaceable, adverse, continued and exclusive possession of said land sued for by pl'ff (save & except the land above described & quit-claimed) for more than ten years before the institution of this suit, and during said ten years

the s'd pl'ff did not make entry upon said lands or any part thereof, wherefore their right of entry, if any they had, is forever barred, and def'ts claim and charge that they have a full and perfect title as against pl'ff to said land.

And def'ts, further amending, says that he strikes out the word "next," wherever it occurs in his pleas of the statute of limitations heretofore filed in this cause.

E. J. GURLEY,
For Def't.

20 And afterwards the following entries appear upon the minutes of the court.

Jury empaneled.

THURSDAY, *March* 1, 1877.

THOMAS J. HOLLINGSWORTH *vs.* JOHN T. FLINT ET AL. } No. 1579.

This cause called for final hearing, came the parties by their respective attorneys, the plaintiff by W. M. Walton, F. W. Chandler and Copewood, and the defendants by E. J. Gurley, Graham, Terrell & Walker, and leave having been granted to defendants to amend, and amendment filed, thereupon on the pleas and issues joined came a jury of twelve good and lawful men of the western district Texas, to wit: C. J. Huppertz, Frank Hopkins, Tim McCarty, J. H. Leatherman, W. P. Calloway, A. Deffenbaugh, S. C. Moore, Wm. Hudson, B. F. Roe, Henderson Rawlings, Wm. Brown, and Ned. Green, who were sworn, tried and empannelled to try the case.

And afterwards the following entry appears upon the minutes of the court.

Verdict & judgment.

MONDAY MORNING, *March* 5, 1877.

THOMAS J. HOLLINGSWORTH *vs.* JOHN T. FLINT ET AL. } No. 1579.

On this day came the parties, the plaintiffs by W. M. Walton, F. W. Chandler and Copewood, and the defendants by Ferrell & Walker, E. J. Gurley and Graham, and came also the jury in the cause, to wit, S. C. Moore, and eleven others heretofore named, who, having heard
21 the evidence, the argument of counsel, and the charge of the court, returned into court the following verdict, to wit: "We, the jury, find for the defendants.—S. C. MOORE, *Foreman.*"

It is therefore considered by the court that the defendant go hence without day, the plaintiff take nothing by his said suit, and the defendants recover all their costs in this behalf expended, to be taxed, and for which they may have their execution.

And afterwards motion for a new trial was filed in words to wit:

22 Motion for new trial, endorsed to wit: In U. S. circuit court. Austin Hollingsworth vs. Flint & Chamberlain. Motion for new trial.

In words following:

Motion for new trial.

THOMAS J. HOLLINGSWORTH
vs.
D. T. CHAMBERLAIN. } No. 1579.

And now comes the plaintiff and moves the court to grant him a new trial in this cause on the following grounds:

1st. That the court erred in each of its several rulings made upon the trial of this cause, and which are set out and excepted to by plaintiff in his bill of exceptions now on file in this cause.

2nd. That the court erred in each of its several instructions given to the jury in the trial of this cause, and which are recited and excepted to in plaintiff's said bill of exceptions so on file.

3rd. The verdict of the jury is against the law and the evidence.

F. W. CHANDLER,
BETHEL COOPWOOD,
WALTON, GREEN & HILL,
Att'ys for Plaintiff.

23–25 And afterwards the following entry appears:

Order overruling.

MONDAY, *March 19th*, 1877.

HOLLINGSWORTH
vs.
FLINT & CHAMBERLAIN. } 1579.

In this cause came the parties by their respective attorneys, and upon the motion for a new trial herein argued on Saturday, and held for consideration by the court; the court, being now sufficiently advised, is of the opinion that the motion ought to be, and it is hereby, overruled by the court.

Bill of exceptions, endorsed, to wit: 1579. Hollingsworth vs. Flint et al. Bill of exceptions. Agreed. Walton for pl'ff, Terrell & Walker for def'ts. Filed March 7th, 1877. M. Hopkins, cl'k.

Which is in words as follows:

Bill of exceptions.

THOMAS J. HOLLINGSWORTH
vs.
JNO. T. FLINT & D. T. CHAMBERLAIN. } 1579.

Be it remembered that on the trial of this case:

I.

That after all the pleadings had been read, and after the pl'ff had read in evidence to the jury, without objection, the original grant for the land in controversy to Miguel Davila, which original grant is as follows:

26 *Original grant to Miguel Davila.*

Sello 3°, 4rrs., habilitado por el Estado de Coahuila y Texas, para los años de 1832 y 1833.

(Firmado) LESASSIER.

Pago el interesado en esta receptoria á mi cargo 4 rls. valor del sello antecedente.

Villa de Austin, 2 de Octubre de 1833.

(Firmado) SAMUEL M. WILLIAMS.

Señor Alcalde de la Villa de Austin:

El Apoderado de Miguel Dávila, natural de la ciudad Leona Vicario, como mas haya lugar en derecho y bajo las protestas útiles y necesarias, ante V. me presento diciendo: Que mi parte obtiene derecho, con arreglo al artículo 24 de la ley de colonizacion del Estado, de 24 de Marzo de 1825, á once sitios de tierra que le otorgó en venta el Supremo Gobierno del Estado, con fecha trece de Julio de 1830, segun lo acredita el documento original expedido por la Sria. del mismo Supremo Gobierno qe. acompaño. Y en nombre de mi parte ruego á V. justicia mediante se sirva mandar se me dé posesion personal de once sitios de tierra sobre el Rio San Andres por su parte meridonal ó derecha y al punto donde los arroyos que llaman Buffalo Creek y Donaho's Creek entre al dho. rio por la márgen referida, cuyo terreno está dentro de los límites de la colonia de los Señores Austin y Williams, dando ellos su aprobacion. Suplicandole ademas que se sirva mandar practicar
27 cuantas diligencias sean conducenter al interés de mi parte. En la inteligencia que ofrezco cultivarlos de conformidad con lo prevenido por la ley y á complir con las demas obligaciones de la misma. Portanto:

A V. suplico se sirva atender á esta solicitud en que recibiré gracia.

Villa de Austin á 2 de Octubre de 1833.

(Nota al márgen:)

VILLA DE SAN FELIPE DE AUSTIN,
3 de Octubre de 1833.

Por presentado y admitido como lo pide. Se pasará á los Señores Empresarios Austin y Williams para que manifiesten su parecer acerca de esta instancia. Y habido que sea su aprobacion pasará al agrimensor scientífico y principal cuido. Francis W. Johnson á practicar las medidas de los once sitios denunciados por el apoderado de Miguel Dávila por qe. en vista de ellas y de la certificacion que debe hacer conforme á la ley se le estenderá los títulos que le corresponden, agregandose el documento original del gobierno, á que se refiere. Así lo mando y firmo.

(Firmado) LESASSIER.

VILLA DE SAN FELIPE DE AUSTIN
á 3 de Octubre de 1833.

Conforme al artículo 9 de la contrata que tenemos celebrada con el Supremo Gobierno del Estado de Coahuila y Texas, y lo prevenido
28 en el artículo adicional de las instrucciones de comisionados de fecha 25 de Abril del año de 1830, otorgamos nuestra aprobacion y consentimiento á que se posesione el apoderado de Miguel Dávila de los once sitios de tierra que solicita segun los tiene denunciados, los cuales son valdíos.

(Firmado) SAMUEL M. WILLIAMS,
Por sí y Como Apoderado di su Compañero.

Señor Alcalde y Comisionado:

El terreno de once sitios de tierra que tengo medido para el apoderado del ciudadano Miguel Dávila está situado sobre la márgen derecha ó meridional del rio San Andres, al punto donde los arroyos Bufalo Creek y Donaho's Creek, entran al dho. rio, cuyos límites, linderos y mojones son en la forma siguiente: principiando la medida á una estaca plantada sobre la márgen de un barranco ó ravina de la que 4 varas al norte 59° oeste hay una encina blanca (white oak) 18 pulgadas en diametro, se tiró una línea al sur veinte grados al poniente diez y nueve mil seiscientas varas, cruzando los arroyos que llaman "Clay's Creek" y "Alligator Creek" segun demuestra el plan, hasta la esquina nordeste de un terreno de seis sitios medido para Pedro Zarza, que es una estaca de la que 382 varas al sur 20 grados al poniente hay un mezquite 8 pul-
29 gadas en diametro; de este punto al norte 70 grados al poniente se tiró otra línea trece mil setecientas cincuenta varas, y siguiendo el lindero septentrional del mencionado terreno de Zarza hasta la esquina nordoeste del mismo terreno, que es una estaca en un monton de tierra en el llano; de este punto se tiró otra línea al norte 20 grados al oriente veinte mil trescientas cincuenta varas, hasta el dicho rio á una estaca de la que 5 vs. al sur 53° al oriente hay un palo blanco y 11 varas al norte hay un nogal. De aquí, siguiendo el dicho rio por sus vueltas abajo, hasta el punto de principias y comprende una área plana de 275,000,000 varas cuadradas, ó lo que es igual once sitios de tierra. Y se compone segun mi leal saber y entender de dos sitios de la clase de temporal y nueve sitios de la de agostadero y su configuracion es la que demuestra el plan que acompaño.

(Firmado) F. W. JOHNSON.

Sello tercero. Dos reales. Hacienda del Estado Libre de Coahuila y Texas. (Sello.) Para el bienio de 1830 y 1831.

Ecsmo. Sor.: El ciudado. Miguel Dávila, natural y vecino de la ciudad de Leona Vicario, capital del departamnto. de Coahuila y Tejas, con el debido respeto á V. E. hago presente qe. careciendo de terreno pa. agricultura y cria de ganados y al mismo tiempo deseoso del aumento y progreso de dho. Estado á V. E. ruego se digne otorgarme en venta
30 once sitios de tierra de las valdías de este departamento, juntos ó separados, ó del modo qe. mas me convenga, ofreciendo como ofrezco, poblarlas y cultivarlas en el modo y forma qe. previene la ley. Y suplico á V. E. se sirva concederme pa. la satisfaccion del importe de dichos sitios los plazos que la misma ley espresa. Por tanto:

A V. E. pido y suplico se sirva acceder á esta mi solicitud en que recibiré gracia.

Leona Vicario, Julio 10 de 1830.

Ciudadano MIGUEL DÁVILA.

LEONA VICARIO, 13 *de Julio de* 1830.

Conforme al arto. 24 de la ley de colonizacion de 24 de Marzo de 1825, otorgo en venta al suplicante los once sitios qe. solicita en los términos valdíos del Estado en el parage que mas le acomode, despues de demarcados por el comisionado del Supmo. Gobno. Gral. los suficientes pa. pago de lo que el Estado adenda á la federacion. El Alcalde Constitucional de la municipalidad á qe. pertenezca el espresado terreno lo meterá en posesion de dichos sitios y espedirá el correspondiente título, calificando previamente la calidad de ellos pa. el señalamiento de lo que debe satisfacer al Estado, pa. cuyo pago le concedo los plazos qe. designa el arto. 22

de la referida ley. Dése pr. la Sria. al interesado copia de su peticion y este proveido pa. que ocurriendo con ella al comisionado, surta los efectos que son consiguientes.

VIESCA.
SANTIAGO DEL VALLE, *Srio.*

31 Es copia de su original qe. ecsiste en el archivo de la Sria. de mi cargo, de donde se mandó sacar pr. disposicion del ecsmo. Sñ. Gobr.

Leona Vicriro. 14 de Julio de 1830.
(Firmado) SANTIAGO DEL VALLE, *Srio.*

Sello 3º. 4 rrs. habilitado por el Estado de Coahuila y Tejas para los años de 1832 y 1833.

Pagó el interesado en esta receptoria de mi cargo 4 rrs. valor del sello que antecede.

Villa de Austin, 2 de Octe. de 1833.
(Firmado) SAMUEL M. WILLIAMS.

En la villa de San Felipe de Austin, á los diez y ocho dias del mes de Octubre, del año de mil ochocientos treinta y tres, Yo, el ciudadano Luke Lesassier, Alcalde Constitucional de esta villa y su municipalidad, en uso de las facultades que me tiene conferidas el Supremo Gobierno de este Estado por decreto fecho en la ciudad de Leona Vicario el dia trece de Julio de mil ochocientos treinta, y en atencion á la venta otorgada por el dicho Supremo Gobierno á favor del ciudadano Miguel Dávila, natural y vecino de la dicha Leona Vicario, de once sitios de tierra como consta del superior decreto de venta fecho en la citada ciudad el referido trece de Julio de mil ochocientos treinta, presentado por su apoderado el ciudadano

sentado á fojas tres y uelta de este expediente. Y en aten-
32 cion á la superior órden del Exmo Señor Vice Gobernador en fecha 29 del mes de Enero del presente año, circulada por el Señor Gefe de este Departamento en 19 del pr pº Febrero, declarando quedar sin efecto las providencias dictadas por el Supremo Gobierno del Estado sobre que los ciudadanos á quienes se les han concedido terrenos no pudieran tomar posesion de ellos hasta verificado el señalamiento que debia de haberse hecho el Señor Comisionado General de la Nacion y no pertenecen los once sitios denunciados por el interesado á ninguno de los puntos conferidos á la confederacion por la citada órden. Y en vista de la aprobacion otorgada por los Señores Empresarios Austin y Williams sentada á la vuelta de la primera foja de este expediente por corresponder los terrenos á la empresa de dichos Empresarios. De conformidad con la ley de colonizacion del Estado, de veinte y cuatro de Marzo de mil ochocientos veinte y cinco y en nombre del Estado confiero y meto en posesion real, actual y virtual al espresado apoderado del ciudadano Miguel Dávila de once sitios de tierra, los mismos que pidió y que se le vendió el gobierno sobre el Rio San Andres, cuya situacion, linderos, límites y mojones estan demarcados en la nota de medidas puestas por el agrimensor scientífico y principal ciudadano Francis W. Johnson, en fojas dos y vuelta de este expediente, con la configuracion que muestra el mapa agregado. Los espresados sitios que por dha. nota de medidas

parecen al agrimensor ser de temporal, en dos sitios y de agostadero
33 en nueve sitios, yo, el referido Alcalde y Comisionado, en uso de la facultad que me dá la ley, lo declaro y clasifico con arreglo á lo

que debe tatisficer al Estado, la cantidad de un mil doscientos pesos segun lo dispuesto en el artículo veinte y cuatro de la referida ley colonizacion de fecha veinte cuatro de Marzo de mil ochocientos veinte y cinco, y en los plazos que designa el artículo veinte y dos de la misma, bajo las penas que ella establezca. Quedando advertido que dentro de un año debe construir mojoneras permanentes en cada ángulo del terreno: que debe cultivarlo de conformidad con lo determinado en la referida ley, que cumplirá escrupulosamente con todo lo que en ella y otras se ordena.

Por tanto, usando de las facultades que me son concedidas por el citado decreto del Supremo Gobierno del Estado y demas disposiciones del mismo gobierno en la materia, por la ley é instrucciones que me rijen, espido el presente instrumento y mando que se saque testimonio de él y se entregue al interesado para que posea, use y disfrute el terreno que se le ha vendido, él, sus hijos, herederos, y succesores, ó quien de él ó de ellos causa hubiere ó derecho representare, por ser así la voluntad del estado.

Es dado en la dicha villa de San Felipe de Austin fha. ut supra que firmo con testigos de asistencia conforme à la ley.

(Firmado) L. LESASSIER.

De Asis^{a}.

34 De Asis^{a}.

(Firmado) C. C. GIVENS.

STATE OF TEXAS, GENERAL LAND OFFICE,
Austin, December 22d, 1876.

I, J. J. Groos, commissioner of the general land office of the State of Texas, do hereby certify that the above and foregoing is a correct transcript from the original, taken from pages 126 to 131 of volume 29 of the permanent archives of this office.

In testimony whereof I hereto set my hand and cause the impress of the seal of the general land office to be stamped, on the day and date last above stated.

[SEAL.] (Signed) J. J. GROOS,
Commissioner.

35 Endorsed, to wit: No. 1579 & 1584. Translated copy of eleven leagues grant to M. Davila. Filed Dec. 30, 1876. M. Hopkins, clerk.

A certified translated copy, whereof is as follows:

Stamp third denomination, 4 rials, validated by the State of Coahuila and Texas, for the years 1832 & 1833.

(Signed) LESASSIER.

The party interested has paid into this receiver's office, under my charge, 4 reals, the price of the foregoing stamp.

Austin, October 2d, 1833.

(Signed) SAMUEL M. WILLIAMS.

To the mayor of the city of Austin:

Attorney for Miguel Davila, a native of the city of Leona Vicario, without prejudice to his legal rights, and under all the necessary and required protests, represents to you that his principal acquires the right under article 24 of the State colonization of the 24th of March, 1825,

to eleven leagues of land, which the executive of the State did authorize him to purchase under date of the thirteenth of July, 1830, as the original document issued from the office of the secretary of state,
36 and herewith accompanied, will accredit, and in the name of his principal he prays you that, justice intervening, you be pleased to direct that personal possession be given to him of eleven leagues of land on San Andres River, on the south or right bank thereof, at the point where the two creeks, called Buffalo Creek and Donahoe's Creek, empty into said river on the side aforesaid, which land is situated within the limits of Messrs. Austin and Williams' colony, upon their consent thereto being obtained. He further prays you to be pleased to direct such action to be had in the premises as may be conducive to the interests of his principal, with the understanding that he binds himself to cultivate them in conformity to the provisions of law, and to comply with all the remaining obligations thereof.

He therefore prays you to grant his petition, wherein he will receive grace.

City of Austin, October 2d, 1833.

(No signature.)

(Marginal note:)

CITY OF SAN FILIPE DE AUSTIN,
3rd of October, 1833.

37 Presented and granted as prayed for. Referred to Messrs. Austin and Williams for their opinion upon this application, and their approval being had thereto, it will be forwarded to citizen Francis W. Johnson, the duly qualified surveyor-general, for the survey of the eleven leagues of land located by the attorney for Miguel Davila, that upon the return thereof, and the classification of the land by him, as directed by law, the respective patents thereto may issue, and attaching thereto the original document from the secretary of state's office, to which reference is therein made.

I have so ordered, and hereto set my hand.

(Signed) LESASSIER.

CITY OF SAN FELIPE DE AUSTIN,
3d of October, 1833.

In conformity with the provisions of article 9 of the contract entered into between us and the executive of the State of Coahuila and Texas, and of the provisions of the additional article of instructions issued to commissioners, bearing date the 25th of April, in the year 1830, we grant our approval and consent that possession be given to the attorney for Miguel Davila of the eleven leagues of land that he applies for, to be located as he designates, and which are unappropriated.

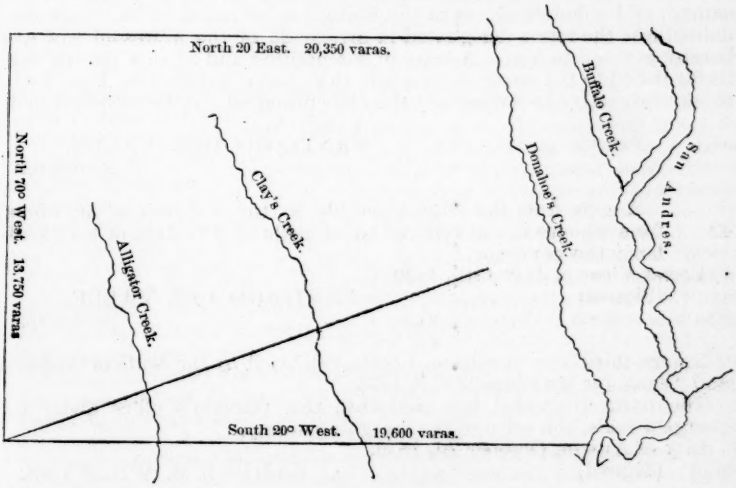
(Signed) SAMUEL M. WILLIAMS,
For Himself and as Attorney for his Partner.

38 To the mayor and commissioner:

The tract of eleven leagues of land which I have surveyed for the attorney for citizen Miguel Davila is located on the right or south bank of San Andres River, at the point where the creeks Buffalo Creek and Donahoe's Creek empty into said river; the limits, boundaries, and corners of which are as follows: Beginning the survey at a stake set on the bank of a bluff or ravine from which a white oak 18 inches in diameter bears north 59° west; thence south twenty degrees

west nineteen thousand six hundred varas, and crossing the creek called Clay's Creek and Alligator Creek, as shown on the plot, to the northeast corner of a six league tract surveyed for Pedro Zarza, a stake from which a mezquite 8 inches in diameter bears south 20 degrees west, at 382 varas; thence north 70 degrees west thirteen thousand seven hundred and fifty varas, with the north boundary of Zarza's aforesaid tract, to its northwest corner, a stake in a mound of earth in the prairie; thence north 20 degrees east twenty thousand three hundred and fifty varas to the river aforesaid; thence down the river with its different meanders to the place of beginning, and covering a superficial area
39 of 275,000,000 of square varas, or their equivalent, eleven leagues of land. According to the best of my knowledge and understanding it contains two leagues of unirrigable farming land, and nine leagues of grazing land, with the outlines set forth on the plot herewith accompanied.

(Signed) F. W. JOHNSON.



40 Stamp third denomination, two reals, treasury of the free State of Coahuila and Texas. (Seal.) For the biennial term of 1830 & 1831.

To his excellency, citizen Miguel Davila, a native and resident of the city of Leona Vicario, capital of the department of Coahuila and Texas, respectfully represents to your excellency that, being in need of land for agricu tural purposes and stock raising, and desirous at the same time of contributing to the growth and prosperity of said State, he prays your excellency to be pleased to authorize him to purchase eleven leagues of land from the public domain of this department, in one body, or in several tracts, or as it may best suit him, binding himself as he does to settle and cultivate them in the manner and form prescribed by

law. He further prays your excellency to grant him the terms designated in said law for the payments to be made on said lands.

He therefore prays your excellency to be pleased to grant his petition, wherein he will receive grace.

Leona Vicario, July 10th, 1830.

Citizen MIGUEL DAVILA.

LEONA VICARIO, *July 13th*, 1830.

41 Pursuant to article 24 of the colonization law of the 24th of March, 1825, I authorize the petitioner to purchase the eleven leagues of land that he applies for from the public domain of the State wherever he may select, after the commissioner from the general government shall have selected a sufficient quantity to cover the amount of the indebtedness of the State to the federation. The lawfully constituted mayor of the municipality to which the aforesaid land belongs will put him in possession of the aforesaid leagues and issue the respective patent thereto, after having classified their quality so as to establish the amount of his indebtedness to the State, for the payment of which indebtedness the terms designated in article 22 of the aforesaid law are hereby granted to him. A copy of his petition and of this permit will be furnished to the party interested, that upon application therewith to the respective commissioner the ends proposed may be accomplished.

VIESCA.

SANTIAGO DEL VALLE,
Secretary.

42 A copy from the original on file in the archives of my office, from whence it was ordered to be made by direction of his excellency the governor.

Leona Vicario, July 14th, 1830.

(Signed) SANTIAGO DEL VALLE,
Secretary.

Stamp third denomination, 4 reals, validated by the State of Coahuila and Texas, for the years 1832 & 1833.

The party interested has paid into this receiver's office under my charge 4 reals, the price of the foregoing stamp.

City of Austin, October 2d, 1833.

(Signed) SAMUEL M. WILLIAMS.

At the city of San Felipe de Austin, on the eighteenth day of the month of October, in the year one thousand eight hundred and thirty-three, I, citizen Luke Lesassier, the lawfully constituted mayor of this city and its municipality, in the exercise of the powers vested in me by the governor of this State, as per order dated at the city of Leona Vicario the thirteenth of July, one thousand eight hundred and thirty, and in consideration of the sale authorized to be made by the executive aforesaid in favor of citizen Miguel Davila, a native and resident
43 of the said Leona Vicario, of eleven leagues of land, as appears by the executive permit issued at the aforesaid city on the thirteenth of July, one thousand eight hundred and thirty, as aforesaid, presented by citizen (name blank in the original), entered on page three and its reverse of this protocol, and in consideration of the executive order of his excellency the lieutenant-governor, bearing date the 29th of the month of January of the current year, circulated by the head of civil

affairs for this department on the 19th of February last past, declaring the orders issued by the governor of the State to the effect that those citizens to whom grants of land had been made could not take possession of them until the commissioner-general of the nation should have made his selections, to be null and void; and whereas the eleven leagues of land located by the party interested are not covered by any of the reservations made to the federation under the aforesaid order, and in consideration of the approval had from Messrs. Austin and Williams, the contractors, as set forth on the reverse of the first page of this protocol, the lands located being embraced within the limits of the said contractors' colony: Therefore, in conformity to the State colonization
44 law of the twenty-fourth of March, one thousand eight hundred and twenty-five, and in the name of the State, I grant, confer upon, and put the aforesaid attorney for citizen Miguel Davila, in the full, actual, and corporeal possession of eleven leagues of land, the same which he has applied for and which were sold to him by the government on San Andres River, the situation, limits, boundaries, and corners of which are described in the field-notes returned by citizen Francis W. Johnson, the duly qualified surveyor-general, as set forth on page two and its reverse of this protocol, with the outlines set forth on the plat thereto attached. The aforesaid leagues, which, according to the field notes, are reported by the surveyor as containing two leagues of unirrigable farming and nine leagues of grazing land, I, the aforesaid mayor and commissioner, in the exercise of the authority conferred upon me by law, do so declare and classify them, in accordance with which classification he will pay to the State the sum of one thousand two hundred dollars, as provided in article twenty-four of the aforesaid colonization law of the 24th of March, 1825, on the terms specified in article twenty-two thereof, and under the penalties therein prescribed. He
45 is notified that he will be required to construct permanent corners at each one of the corners of said land within one year; that he shall cultivate it in conformity with the requirements of said law, and that he shall faithfully comply with the requirements of that and other laws in the premises.

Therefore, in the exercise of the powers conferred upon me under the aforesaid order of the executor and other instructions emanating from the same authority in the premises, by the law and instructions by which I am governed, I issue this instrument, and direct that a certified copy (testimonio) thereof be made and delivered to the party interested; to have and to hold the land so sold to him for himself, his children, heirs, and assigns, or any one claiming or to claim the same by, under, or through him or them, such being the pleasure of the State.

Given at the aforesaid city of San Felipe de Austin, date ut supra, which I subscribe with attesting witnesses, according to law.

(Signed) L. LESASSIER.

Attest: (No signature.)

Attest:

(Signed) C. C. GIVINS.

46 GENERAL LAND OFFICE,
TRANSLATOR'S DEPARTMENT,
Austin, March 30, 1876.

The foregoing is a correct translation from the original Spanish of what purports to be a grant to Miguel Davila, as contained on pages

126 to 131, inclusive, of volume 29, of the permanent records of this office.

DAVID V. WHITING,
Spanish Translator.

STATE OF TEXAS,
GENERAL LAND OFFICE,
Austin, March 30th, 1876.

I, J. J. Groos, commissioner of the general land office of the State of Texas, do hereby certify that David V. Whiting, whose signature is subscribed to the certificate of a translation made by him of what purports to be a grant to Miguel Davila, is the Spanish translator of this office, duly qualified according to law, and that his official acts as such are entitled to full faith and credit.

In testimony whereof I hereto set my hand and cause the impress of the seal of the general land office to be stamped on the day and date last above stated.

[L. S.] J. J. GROOS,
Commis'r.

47 Whereupon the pl'ff offered in evidence to the jury, in connection with the title papers already read in evidence, the following original deed, in Spanish, from the grantee in the original title to James Hewitson, dated the day of 1839, and which is in the words & figures as follows:

48 *Deed to Hewetson.*

Sella Tercero (Sello) Dos Reales. Para los años de mil ochocientós treinta y seis y ochocientos treinta y siete. Habilitado por el Departº de Coahuila para el bienio de 1838 y 39. Leona Vº, Enero 2 de 1838.
J. Y. DE ALCOCÈR. (Rúbrica.)
V. VALDÈS. (Rúbrica.)

En la ciudad del Saltillo, á los siete dias del mes de Mayo de mil ochocientos treinta y nueve, ante mí, el ciudadano Felipe Barberena, regidor del Ylustre Ayuntamiento, Alcalde tercero en turno, y Juez de Primera Ynstancia del Juzgado Segundo de esta misma ciudad y su jurisdicion autuando, con testigos de asistencia á mas de los instrumentales que al fin se nominaran, comparecio el ciudadano Miguel Dabila, vecino labrador en la Hacienda de San Ysidro de Palomas de esta misma jurisdicion á quien doy fé conozco, y dijo que por la presente y en la mas bastante forma que haya lugar en derecho sierto del que en este caso le pertenece, por sí y á nombre de sus herederos, succesores, y quien de todos hubiere título, vez ó recurso, otorga que bende y dá en benta pública y enagenacion perpetua por juro de heredad y para siempre jamas á Don Santiago Hewetson, á saber: once sitios de tierra valdía que hubo por concesion que de ellos le hizo el Gobierno del Estado de Coahuila y Texas, por decreto de trese de Julio de mil ochocientos treinta los cuales sitios se hayan, diez sobre las aguas del arroyo llamado Choc-
49 taw del Rio Rojo y el undécimo entre el arroyo Sulphur Fork del Rio Rojo y el ramo del sur de dicho arroyo como á distancia de veinte millas al poniente del camino que vá de Nacogdoches al Kiamichi del mismo Rio Rojo, cuyas medidas se espresan en el título de posesion espedido en Angelina jurisdiccion de Nacogdoches á treinta de Enero

de mil ochocientos treinta y seis, por Don Vicente Aldrete, comisionado al efecto por el indicado Gobierno, cuyo título y decreto doy fé haber visto, leido y que le paso y entrego al citado Hewetson. Y declara el vendedor que los once sitios de tierra estan libres de hipoteca, tributo, empeño ni otro gravámen y como tales los vende y asegura al comprador en cantidad de doscientos pesos siendo de cuenta de la venta el derecho de alcabala y costo de escritura y como pagado á su satisfaccion de la citada cantidad renuncia la non numerata y demas leyes del caso y que no balen mas ni ha hayado quien por ellas mas le ofrezca y sí mas pueden valer, del ecseso que fuere hace gracia y donacion al comprador y sus herederos, pura, perfecta é irrevocable en sanidad, con las firmesas legales y renuncia las leyes que habla de lo que se trata, compra, cambia ó bende por mas ó ménos de la mitad de su justo precio y los cuatro años que prefirien para pedir recision del contrato por sí hubiere padecido engaño, los cuales dá por pasados por no haberlo aqui. Y desde hoy en adelante para siempre se aparta y quita de la accion, propiedad y señorio que á los once sitios
50 de tierra tenía adquiridos y todo lo cede y traspasa en favor del comprador, sus hijos, herederos ó quien sus veces represente, para que los posea, goce, cambie ó enagene á su voluntad como dueño de ellos y sin dependencia alguna. Y se obliga á que dichos sitios seran creitos, seguros y efectivos al comprador y nadie le inquietará ni moverá pleito sobre su posecion, propiedad y goce ni contra ellos aparecerá gravámen alguno y si se moviere ó inquietare de alguna manera luego que el otorgante y sus herederos sean requeridos conforme á derecho saldrán á la ebiccion y saniamiento informa con las costas y perjuicios y menoscabos que se le originen. Y á la observancia de todo lo expuesto quiere ser ejecutado por esta escritura y sin otra prueba de que le releva al comprador, para todo lo cual obliga el otorgante sus presentes y futuros bienes y se somete al fuero y jurisdiccion de los Señores Jueces y Justicias nacionales que de sus causas y negocios puedan y deban conocer para que lo estrechen y obliguen como por sentencia definitiva, pasada en autoridad de cosa juzgada y consentida, que
51 por tal la recibe. Renuncia todas las leyes de su favor y defensa con la general del dr° en forma, y lo firmo, siendo testigos Don Nasario Ortis, Don Antonio de Cuellar, y Dn. Jesus Garcia, presentes y de esta vecindad, doy fé.

Sello Tercero. (Sello.) Dos reales. Para los años de mil ochocientos treinta y seis y ochocientos treinta y siete.
Habilitado por el Departo de Coahuila para el bienio de 1837 y '39.
Leona Vo. Enero 2 de 1838.
J. Y. De ALCOCER. (Rúbrica.)
V. VALDÉS. (Rúbrica.)

FELIPE BARBERENA.
MIGUEL DABILA.

Assistencia:
CLEMENTE DE LA FUENTE.
Assistencia:
FRANCO DE LA FUENTE.

Sacose de su original, con quien concuerda hoy dia de su otorgamiento: vá en dos fojas útiles del papel del Sello Tercero conforme á la ley, de todo lo que el Juez que subscribe da fé.

(Firmado) FELIPE BARBERENA.
A. (firmado): FRANCO. DE LA FUENTE.
A.: CLEMTE. DE LA FUENTE.

En el márgen, Adm^on de R^tas. Unidas del Depart° del Salto (Sello.) El interesado ha satisfecho el correspondiente ^dro de Ale^a.
Salt° Junio 22, 1839.
(Firmado) ARCE. (Rúbrica.)
(Rúbrica.)

Dr^os sin papel de original y tedtimonio con lo escrito y certificacion para la aduana tres y medio pesos y no mas.

Segunda clase. Para el bienio de mil ochocientos sesenta y ocho y sesenta y nueve. (Sello.) 50 centavos 3.

Adm^n de Rentas del Papel Sellado de Coahuila. (Sello)

52 República Mexicana, Gobierno de Estado Coahuila de Zaragosa. (Sello.)

Victoriano Zepeda, Gobernador Constitucional del Estado libre y Soberano de Coahuila de Zaragoza:

Certifico: que el C. Felipe Barberena ya difunto por quien se halla autorizado el antecedente documento ejerció el año de mil ochocientos treinta y nueve las funciones de Regidor del Ayuntamiento y con este carácter desempeñó el empleo de Alcalde 3° en turno y Juez de 1ª Ynstancia del Juzgado 2° de esta capital: que su firma es la misma que usó y acostumbró y á la que se le ha dado y dá entera fé y crédito en juicio y fuera de el.

Y para que conste y obre los efectos convenientes estiendo la presente en el Saltillo, capital del Estado de Coahuila de Zaragoza, á 1° del mes de Junio de mil ochocientos sesenta y ocho.

(Firmado) VICTORIANO ZEPEDA.
(Firmado) J. SERAFIN FRAGOSO, *Srio.*

Filed Dec. 9th, 1876, at 8 o'clock, a. m.

LEVI PENNINGTON,
Clerk. C. C., W. County.

Acknowledged before us this 2d day of June, A. D. 1868.

AARON ANSELL, M. D.
SANTIAGO SMITH.
JOHN T. J. WALKER.
EUG'E MA. AGUERRE.

53 THE STATE OF TEXAS,
County of Milam:

I, J. Nabours, clerk of the district court in and for said county, do certify that the foregoing instrument of writing, together with the certificate of authentication, was filed in my office for record this 19th day of June, 1874, at 8 o'clock a. m., and was duly recorded the 24th day of June, 1874, at 11 o'clock a. m., in book A 2d, on pages 289 and 290.

Witness my official signature and seal of office this 24th day of June, A. D. 1874.

[SEAL.]

J. NABOURS,
Clerk D. C. M. Co.
By B. K. HOMAN,
Deputy.

STATE OF TEXAS,
Williamson County:

I, Levi Pennington, clerk of the county court of said county, hereby certify that the foregoing and attached instrument of writing was filed for record on the 9th day of December, A. D., 1876, at 8 o'clock a. m., and was correctly recorded on the 12th day of December, A. D. 1876, in vol. 18 of the records of deeds for said county, on pages 1, 2, 3, & 4.

To certify which I hereunto set my hand and official seal, at office in Georgetown, this 12th day of December, A. D. 1876.

LEVI PENNINGTON, *Clerk.*

54 CONSULATE OF THE UNITED STATES OF AMERICA AT SALTILLO,
State of Coahuila, Republic of Mexico:

Before me, John D. Carothers, consul of the United States of America for Satillo and the dependencies thereof, this day personally came Tomas de la Vega and José Patricio Ramos, both to me well known, who, being by me duly sworn, on their oaths say, that in the years 1838 and 1839 they knew Clemente de la Fuente and Francisco de la Fuente, and that they were both, on the seventh day of May, 1839, citizens of the State of Coahuila, jurisdiction of Saltillo, in the Republic of Mexico; and affiants further say that they were well acquainted with the handwriting of the said Clemente de la Fuente and Francisco de la Fuente, having seen them both write in their lifetime, and that the signatures of the said Clemente de Feunte and Francisco de la Fuente signed as assisting witnesses to an original testimonio of a public act of sale, made by Miguel Davila to Don Santiago Hewitson, dated on the seventh day of May, 1839, and hereto annexed, are the true and genuine signature of the said Clemente de la Fuente and Francisco de la Fuente, written by them respectively in their lifetime; and affiants further say, that the said Clemente de la Fuente and Francisco de la Fuente are both now dead; and affiants further say, that in the years 1838 and 1839 the' knew Felipe Barbarena, and that on the seventh
55 day of May, 1839, he, the said Felipe Barbarena, was judge of first instance of the second court of the city of Saltillo and its jurisdiction; that they were well acquainted with the handwriting of the said Felipe Barbarena, having seen him write often in his lifetime, and that the signature of the said Felipe Barbarena signed to said original testimonio hereto annexed is the true and genuine signature of the said Felipe Barbarena, written by himself in his lifetime; and affiants further say that the said Felipe Barbarena is now dead.

TOMAS DE LA VEGA,
JOSÉ PATRICIO RAMOS.

Sworn to and subscribed before me at office this day, to certify all of which I hereto sign my name officially and attach my official seal this 21st day of September, A. D. 1876.

[SEAL.] J. D. CAROTHERS,
U. S. Consul.

No. 11. $2.00.
Filed Dec. 30th, 1876.

M. HOPKINS, *Clk.*

A translation of which, made under the order of the court, is as follows:

56 *Translation of deed to Hewetson.*

Stamp third denomination. (Seal.) Two reals. For the years 1836 and 1837.

Validated by the department of Coahuila for the biennial term of 1838 and 1839.

Leona Vicario, January 2d, 1838.

(Signed) J. Y. DE ALCOCER.
(Signed) V. VALDEZ.

At the city of Saltillo, on the seventh day of May, in the year one thousand eight hundred and thirty-nine, before me, Citizen Felipe Barberena, alderman of the town council, acting as mayor, third in rotation,

and civil and criminal judge of the second court of this same city and its jurisdiction, officiating with attesting witnesses in addition to the documentary ones, who will be named at the conclusion of this instrument, appeared Citizen Miguel Davela, a resident farmer on the plantation of San Isidor de Palomas, of the same jurisdiction, whom I certify to be known to me, and stated that hereby, and in the most legal form prescribed by law, in the exercise of the rights in him vested, in the premises, for himself, and in the name of his heirs and assigns, or any one claiming right, title, or interest therein through him or
57 them, acknowledges that he sells and conveys by public instrument and in fee simple forever to Don Santiago Hewetson, to wit: Eleven leagues of land obtained from the public domain by virtue of a permit issued for them to him by the executive of the State of Coahuila and Texas, by order of July 13th, 1830, which leagues are situated ten on the waters of the creek called Choctaw of the Red River, and the eleventh between Sulphur Fork Creek of Red River, and the south fork of said creek, distant about twenty miles west of the road leading from Nacogdoches to Kiamichi, of the same Red River, the survey of which is embodied in the patent issued at Angelina, jurisdiction of Nacogdoches, on the 30th day of January, 1836, by Don Vicente Aldrete, commissioner appointed for that purpose by the aforesaid executive, which patent and order I certify to have seen, read, and that I pass to and deliver to the aforesaid Hewetson, and the vendor declares that the eleven leagues of land are free from mortgage, tax, lien, or other incumbrance, and as such he sells and warrants the same to the purchaser for the sum of two hundred dollars, the excise tax and conveyance fees to be for account of the sale to be paid by the purchaser, and that the aforesaid amount has been paid to his satisfaction. He waives
58 the (non numerata) want of consideration and other laws in the premises; that it is not worth any more, and that he has not found any one who would offer him more, and that if it should be of greater value, he grants and donates the excess, whatever it may be, to the purchaser and his heirs fully, completely, and irrevocably, warranting the same with the legal securities, and he waives the laws that refer to agreements, purchases, exchanges, or sales made for more or less than one-half of their proper value, and the four years within which to demand the rescinding of the contract in case there should be fraud, which he admits as having expired, there being none in this instance, and that from this time forward, forever, he cancels and divests himself of the right, title, and dominion over the eleven leagues of land that he has acquired, and conveys and transfers all of it in favor of the purchaser, his children, heirs, or assigns, to have and to hold, exchange, or alienate the same at will as owner of the same, without any limitation whatever; and he warrants the aforesaid leagues firmly, securely, and effectually to the purchaser, and that he shall not be disturbed in, nor suit instituted against him for the possession of, title to, and use
59 thereof, and that no encumbrance shall arise upon them, and that should there be any such instituted, or he be disturbed in any manner, that the grantor and his heirs be required, according to law, to come forward and duly warrant and defend the same, together with the costs, damages, and losses that he may sustain, and to the performance of all the above he wishes to be held by this instrument, and without any other evidence, he to be substituted for the purchaser; to which end the grantor pledges his estate, now or hereafter to be acquired, and submits to the authority and jurisdiction of the national judges and justices authorized and required to take cognizance in such cases, to compel and to hold him

thereto as by virtue of a judgment rendered, made final and consented to, and that he admits it as such. He waives all the laws that may favor or protect him, with the general laws governing the case, in due form; and in testimony thereof I hereto set my hand, Don Narciso Ortez, Don Antonio Cuellar and Don Juan Garcia, of this place, being present and witnesses thereto.

FELIPE BARBERENA.
MIGUEL DAVILA.

Attest:

CLEMENTE DE LA FUENTE.

Attest:

FRANCISCO DE LA FUENTE.

60 Taken from its original, with which it agrees, on this the day of the execution thereof. It is contained on two written pages of stamped paper of the third denomination according to law, to all of which the undersigned hereby certifies.

(Signed) FELIPE BARBERNA.

Attest:

(Signed) FRANC'O DE LA FUENTE.

Attest:

(Signed) CLEMENTE DE LA FUENTE.

Fees without the paper for the original and duplicate (testimonied), including copying and certificate for the revenue office, three and one-half dollars, and no more.

(Endorsement on the margin of second page:)

Revenue office of the department of Saltillo, consolidated. (Seal.) The party interested has paid the required excise tax.

Saltillo, June 22rd, 1839.

(Signed) ARCE.

And in connection with said deed was considered, by request of the defendants, the following instrument:

(Endorsed:) Filed Feb. 27, 1877. M. Hopkins, cl'k.

61 (Endorsed, to wit:) No. 1579. Hollingsworth vs. Flint and Chamberlain. X. Filed Feb. 27, 1877. M. Hopkins, clerk.

MOST EXCELLENT SIR: The C. Miguel Davila, a native and resident of the city of Leona Vicario, capital of the department of Coahuila and Texas, with due respect before your excellency, make presents, that lacking land for agricultural and stock-raising purposes, and at the same time desirous of the increase and progress of the said State, I request your excellency to be pleased to grant me by sale eleven leagues of land of the public domain of this department, jointly or separately, or in the way most convenient to me, offering, as I offer, to settle and cultivate the same according to law; and I request your excellency to be pleased to concede me for the payment of said leagues the terms expressed by the said law. Now, therefore, I ask and request your excellency to be pleased to accede to this, my petition, wherein I will receive mercy.

Leona Vicario, July 10th, 1830.

C. MIGUEL DAVILA.

LEONA VICARIO, *July 13th*, 1830.

In conformity with the 24th article of the colonization law of March, 24th, 1825, I grant by sale to the petitioner the eleven leagues he solicits of the public domain of the State, at the point which may suit him best, after the commissioner of the supreme general govern-
62 ment has marked out the sufficient to pay the federation the amount due by the State. The constitutional alcalde of the municipality to which the said land may belong to, will put him in possession of said leagues and will issue to him the corresponding title, classifying previously its quality in order to fix the amount to be paid to the State, for which payment I concede him the terms designated by the 22d article of the said law. Let a copy of his petition and of this dispatch be given to the party interested, that on occurring therewith to the commissioner, it may have its due effect.

VIESCA.

SANTIAGO DEL VALLE,
Sec'ry.

This is a copy of its original on file in the archives of the secretary's office under my charge, from which it was taken by order of his excellency the governor, Monclova, June 4th, 1834.

T. ANTONIO.
PADILLA,
Sec'ry.

In the city of Leona Vicario, on the 17th day of the month of May, of 1834, before me, the notary, and witnesses, Mr. Miguel Davila y Gonzales, a resident of San Isidro de Palomas, of this jurisdiction, to me well
63 known, said that, having presented himself to the supreme government of this State, soliciting vacant land of the same in the year 1830, and having been conceded to him eleven leagues of the same by purchase and according to the colonization law, his petition and the dispatch relating thereto, for not having taken out the certificate corresponding to the same, and wishing to make use of the rights which it gives, I grant that he confers and gives all his power, ample, sufficient, as much as may be required and necessary, to the citizen James Hewetson, of this place, general, that he may in the name of the grantor and representing his proper person, right and actions, recover of the secretary's office of the supreme government of this State the certificate already referred to, and after having the same in his possession, he may select of the public domain of the State, the point or points where the leagues of land, which as he has proved, as he knows have been conceded to him in the same year of 1830, receiving them indistinctly, at the point which may suit him best, and ask possession thereof, and take it, doing all necessary acts to acquire its legitimate property, he
64 may contract as he pleases, the right which the petitioner may have, selling it in all or in part by auction sale or otherwise, and in the time he may be able to do it according to the said colonization law, and at the price he may think proper or compromising from now for the responsibility for the amounts he may feel inclined, he may give on the subject the necessary deeds of sale, compromises, obligations or transactions, if it be necessary, with all the clauses, submissions and renunciations of laws to his security, consequently, that in the form and way as it may have been done, whatever his said attorney may effect, it will safeguard him and will be complied with, as if it had been heard and signed by himself, and lastly I confer him this power irrevocable,

for all which it may contain here incident and dependant, for all the other acts, petitions and agencies, judicially or extrajudicially, because he wished it to have no limitation, with free and general administration, with power to put in court, swear and substitute wholly or partly, revoke substitutes and give powers, in relation to this business; notwithstanding any expression, clause, requisites or condition herein not
65 mentioned, it shall always act for the object on account of which it has been conferred for anything that may be required, he gives it for subscribers and accentes, as if it had really been so, and for that purpose he concedes it to him in the same terms, which may be necessary and in compliance of all, what in virtue of this power may be done and practiced, the constituent obligates himself with all his present and future property, and submits himself therewith, to the privileges and jurisdiction of the judges and national justices, which of his cause and business can and should take knowledge, that they may constrain and compel him effectively as if it was by final judgment passed in authority as adjudged and consented matter, and as such he will receive it. He renounces his personal privilege, homstead and residence with the law which prohibits to be subject to foreign jurisdiction, and besides those that may favor him with the general one of common right. Thus I granted and signed, being witnesses the C. C. Antonio de Mareyra, Clemente de la Fuente, and Rafael Mavarro, present and residents of this said city, to which I certify.

MIGUEL DAVILA Y GONZALES.
ANTONIO MARIA PEREZ,
National Notary.

66 Taken for the party interested this day of the issuing of its original, which remains on the protocol under my charge, to which I refer to, written on four useful sheets, its first and last being of paper of the second seal and those between them of the current fourth one, to which I certify.

ANTONIO MARIA PEREZ,
National Notary.

In the city of Monclova, on the fifth day of the month of June, 1834, before me, the C. Felipe Villareal, judge of the 1st instance, appointed of this capital, Mr. James Hewetson, a resident of Leona Vicario, using the right which, by the present power is conferred on him, grants that he substitute it for all and in all on M. B. Menard, a resident of Nacogdoches, on whom it devolves as celebrated. He obligates the property in said power obligates; he grants substitution in due form and signs it. I herewith certify that I know him, being witnesses the C. C. Andres Flores, Santiago Fariax and Luis Castilla, present and residents of this city, besides those of my assistance, according to law, to which I certify.

FELIPE VILLAREAL.
JAMES HEWETSON.

67 Ass't: VENTURA RENDON.
Ass't: JUAN PEDRO BUENO.

In the city of Monclova, on the 24th day of the month of May, of the year 1835, before me, the C. Albino Cortinas, most ancient judge of the 1st instance of said city, called by law that tact by in default of a notary and the instrumental witnesses which for that purpose were appointed, appeared the C. James Hewetson of Leona Vicario, well

known to me, and said that in the use of the rights, which by the preceding power were conferred on him, he substituted all his rights conceded in said power in favor of B. Menard, a resident in Nacogdoches, and said substitution having been without any effect, and it being convenient to substitute the same in another person, in virtue whereof and using the clauses conceded in said power, I have resolved to revoke the substitution made in favor of said Mr. B. Menard, and from now declares for not existing all that may have been done in virtue of said commission, and substitutes in all and for all in the person of
68 the C. John Cameron, a resident of Cerralvo, on whom it devolves as it is devolved. He obligates the property in said power obligated and grants substitution in due form, and to certify to the same he signs it, being witnesses to the instrument the C. C. Andres Gonzalez, Andres Villareal y Rejin, present and of this city, besides those of my assistance, to which I certify.

ALVINO CARTINAS.
JAMES HEWETSON.

Asst: JUAN PEDRO BUENO.
Asst: JOSE ANTO. DE CASTELLO.

Mr. COMMISSIONER: The C. John Cameron, a resident of the town of Cerralvo, in due form before you appear and say, that as an attorney of the C. Miguel Davila, a resident of the city of Leona Vicario, as shown by the power which I duly present to you a second time and ask that it be given back to me, for whatever I may want it, I ask you to be pleased to grant me the possession of eleven leagues of land which my constituent has bought of the supreme government of the State of Coahuila and Texas, as shown by the document I present duly authorized, and issue in favor of my party the corresponding title as a
69 special commissioner appointed for that purpose by the government of that same State. And in conformity with your order of July 2d, of last year, authorizing me to order the survey of the said land, I accompany you the field notes made by the surveyor George Aldrich, on two useful sheets of the third seal, and maps in duplicate of the said eleven leagues of land, ten are situated on the waters of Natchitoches Red River, including the creek called Choctaw Bayou, and the other league is on the waters of the creek called Sulphur Fork of the said Red River. I request you to be pleased to act as asked, this being in conformity with the law, and therefore I swear the necessary that I act in good faith, &c.

Nacagdoches, January 10th, 1836.

JOHN CAMERON.

ANGELINA, *January 29th*, 1836.

Presented and admitted with the accompanying documents, the power of attorney to be returned to the party who presented the same, and the concession of the supreme government of the State to be added to this dispatch for due evidence. And regarding that in conformity
70 with my order of July 2d, of last year, the undersigned attorney had ordered the survey of the said eleven leagues of land by the surveyor George Aldrich, which field-notes he has presented to me on two useful sheets of the 3rd seal, so that they may have their due effect. Let they be added to the dispatch, in order to proceed to do afterwards what may be convenient; thus I order and sign, with those of my assistance according to law, to which I certify.

VICENTE ALDRETE.

Ass't: S. SMITH.
Ass't: JOHN HOWARD.

Mr. COMMISSIONER: The eleven leagues of land which I have surveyed for the C. Miguel Davila are situated as follows: ten leagues are situated on the waters of the creek called Choctaw Bayou of Red River beginning at a stake on a mound for first corner, from which a hackberry 8 in. D. B. S. 8° W., 111 varas, and another hackberry 10 in. D. B. N. 4° 30′ E. 169 varas; thence E. 15,911 varas, intercepted by various creeks, to 2nd corner, formed by a stake on a mound from which a hackberry
71 12 in. D. B. N. 55° E. 78 varas, and another hackberry 10 in. D. B. S. 44° W. 55 varas; thence N. 15, 811 varas, intercepted by various creeks, to third corner, formed by a stake on a mound from which a walnut 20 in. D. B. S. 80° W. $17\frac{4}{10}$ varas, and another walnut 12 in. D. B. S. 88° E. 4 varas; thence W. 15, 811 varas, intercepted by the creek called Choctaw Bayou and various other creeks, to 4th corner in prairie, formed by a stake on a mound from which a post-oak 18 in., D. B. N. 52° W. 82 varas, and another post-oak 11 in. D. B. S. 58° E. 64 varas; thence S. 15, 811 vs. to the place of beginning, containing ten leagues of land, of which two are arable and eight pasture land. Its shape is shown by the maps which I accompany to you in duplicate.

Nacogdoches, November 3rd, 1835.

GEO. ALDRICH.
Surveyor.

The eleventh league which I have surveyed for the C. Miguel Davila is situated between Sulphur Fork of Red River and the S. branch of said creek, about 20 miles W. of the road leading from Nacogdoches to Kiamichi of the Red River, beginning at the S. W. corner of the land surveyed for Patricio Torres, at a stake set on a mound for first cor-
72 ner, from which an ash 20 in. D. B. N. 48° E. $10\frac{4}{5}$ varas, and a black walnut 12 in. D. B. S. 75° W., 9 varas; thence W. 5,000 varas, intercepting at 70 a creek running E. at 1,650 varas, a small creek running S. E. at 4,520 varas, a creek running S. E. at 4,600 varas, another creek, running also S. E., to a stake on a mound for 2d corner, from which a post-oak 18 in. D. B. S. 52° W. $8\frac{3}{5}$ varas, and another post-oak 16 in. D. B. N. 2° E. $13\frac{3}{5}$ varas; thence N. 5,000 varas, to a stake on a mound for 3rd corner, in the prairie; thence E. 5,000 varas to a stake on a mound in the prairie, for 4th corner; thence S. 5,000 varas, until the line of the survey of Patricio Torres, to the place of beginning, containing one league of land. Of the said land five labors are arable, and balance pasture land.

Nacogdoches, July 27th, 1835.

GEO. ALDRICH,
Surveyor.

ANGELINA, *January 30th*, 1836.

The surveys of the eleven leagues of land, which the supreme government of the State granted by sale to the C. Miguel Davila,
73 which possession was claimed by his attorney, the C. John Cameron, being completed, let the corresponding title be issued, and of the maps, which in duplicate were presented by the surveyor George Aldrich, two are to be added to this dispatch and two to the certificate, both to be signed by me; thus I order and sign, with those of my assistance, according to law, to which I certify.

VICENTE ALDRETE,

Ass't: S. SMITH.
Ass't: JOHN HOWARD.

I, the C. Vicente Aldrete, special commissioner appointed by the supreme government of the State of Coahuila and Texas, to give possession to Mexicans who, by sale, have been conceded land by the supreme government of the public domain of the State, considering that eleven leagues of land were granted, as a purchaser, to the C. Miguel Davila, as shown by the concession of July 13th, 1830, of which an authentical copy was presented by his attorney, the C. John Cameron, a resident of the town of Cerralvo, which copy heads this dispatch, considering what it exposes and the merit which by it has obtained the C. Miguel Davila, in the name of the State, and using the powers
74 vested in me by law, the instructions to commissioners and by the above referred to concession, I grant, confer, and put the said C. Miguel Davila in real and personal of the eleven leagues of land, which are situated on the waters of Natchitoches Red River, and those of the Sulphur Fork of said Red River, of which the boundaries are marked on the maps and field-notes made by the surveyor George Aldrich, of which the original documents are added to this dispatch. Of the said eleven leagues one-fifth are arable and four-fifth pasture land, which serves to fix the amount to be paid to the State for the same according to the 22nd article of the colonization law of March 24th, 1825, under the penalties therein established, he being notified that he has to settle and cultivate the same with the privilege to sell and dispose of them in conformity with the provisions of the law. Now, therefore, using the powers vested in me in the matter, and having in view the corresponding instructions, I issue the present title and order that a certificate be taken thereof and handed to the party interested, that
75 he may possess and enjoy as his own the eleven leagues of land granted, he, his children, heirs, and successors, or whoever of him or them may have any cause, action or right, this being the will of the State.

Angelina, January 30th, 1836.

VICENTE ALDRETE.

Ass't: S. SMITH.
Ass't: JOHN HOWARD.

GENERAL LAND-OFFICE,
Austin, Nov. 2d, 1870.

I, John Matthies, translator in the general land-office, bonded and sworn, certify that the foregoing is a correct translation of a title to Miguel Davila for eleven leagues of land in the Spanish language on file in said office.

JOHN MATTHIES,
Translator.

THE STATE OF TEXAS,
Gen'l Land Office:

I, Jacob Kuechler, commissioner of the general land-office of the State of Texas, certify that John Matthies is translator in said office; that he is bonded and sworn, and that his acts as such are entitled to credit.

In testimony whereof I have hereunto set my hand and caused the seal of said office to be affixed at Austin this 2d day of November, A. D. 1870.

[L. S.]

JACOB KUECHLER,
Commissioner.

76 To the introduction of which deed the defendants objected on

the ground that it did not convey the land in controversy, & was therefore irrelevant & inadmissible; which objection, being heard by the court, was sustained, & said deed excluded from going to the jury as evidence, to which ruling of the court the pl'ff then & there, in open court, & at the time said ruling was made, excepted thereto, & time being given to prepare this bill, the same is now prepared & presented for allowance, signing & sealing.

II.

And be it further remembered that in the further progress of the trial of this case, & when the said trial had progressed as far, and as recited in subdivision I of this bill of exceptions, the parties, pl'ff and defendants, agreed to & admitted facts as follows:

Endorsed, to wit: Filed March 1, 1877. M. Hopkins, clerk.

Which is as follows:

Admission of facts.

Suit pending in the circuit court of the United States for the western district of Texas, at Austin.

THOMAS J. HOLLINGSWORTH, PL'FF, *vs.* FLINT & CHAMBERLAIN, DEF'TS. } No. 1579.

77 The plaintiff and defendants in this suit agree and admit that Maria Ines Davila, who, with her husband, Abato Valdez, executed to James Hewetson the deed of confirmation dated the day of , A. D. 1869, was and is legitimate daughter of Miguel Davila, to whom the eleven leagues of land in controversy in this suit were originally granted by the State of Coahuila and Texas, and that this admission and agreement may be read in evidence on the trial of this cause by or on part of either of the parties, plaintiff or defendants, the deed of confirmation referred to being on file in this case.

Feb. 19th, 1877.

BETHEL COOPWOOD,
Att'y for Pl'ff.
E. J. GURLEY, *For Def'ts.*

Whereupon the pl'ff tendered in evidence the following deed from Ma. Ines Davila & Abato Valdez, her husband, dated the day
78 of , 1869, to James Hewitson, endorsed, to wit: "Filed for record November 9th, A. D. 1876, at 9 o'clock a. m. J. C. Rogers, C. C. C. M. C., Texas, by J. W. Hood, d'p'ty." "Filed for record the 27th November, 1876, at 10½ o'clock a. m. W. G. W. Stone, cl'k, C. C. Bell, cr., by Henry Hoelzclaw, deputy." "Filed 9th Dec., 1876, at 8 o'clock a. m. Levi Pennington, clerk C. C. M. County; fee paid; 1579 & 1584. Filed Dec. 30, '76. M. Hopkins, clerk."

Which is in words following:

Deed from Ma. Inez Davila and her husband Abato Valdez.

State of Coahuila, in the Republic of Mexico, city of Saltillo.

Know all men by these presents, that whereas our father, Miguel Davila, of San Ysidro de Palomas, in the State and near the city above

written, did, many years ago, and not long after its issuance, sell and convey in the fullest and most complete manner, to James Hewetson, of the city and State above written, his concession of eleven (11) sitios of land issued on the thirteenth (13) day of July, A. D. eighteen hundred and thirty (1830), by the Government of the State of Coahuila and Texas, and did in like manner constitute him his attorney in fact
79 to receive possession and title to said land; and whereas the said concession has been located and surveyed, and was titled on the eighteenth day of October, A. D. eighteen hundred and thirty-three (1833), in fact, at the instance and for the use and benefit of said Hewetson, on the waters of Little River, formerly known as the Rio San Andres, in the now counties of Milam, and Bell, and Williamson, in the State of Texas, and is distinctly platted on the maps of the general land office of the State of Texas, to which reference is hereby made for a more full and particular description thereof; and whereas our said father, Miguel Davila, as aforesaid, did on the seventh day of May, A. D. eighteen hundred and thirty-nine (1839), by public act, on the margin of which is a receipt of the alcabald due on said sale, convey said eleven (11) sitios of land to said Hewetson, describing said land by mistake as being situated in another part of Texas, instead of where it in fact is situated:

Now, therefore, in consideration of what is hereinbefore recited, we, Maria Inez Davila, and Abato Valdez, her husband, only children and sole heirs at law of the aforesaid Miguel Davila, do hereby ratify and confirm the sale of our said father, Miguel Davila, of the eleven (11) sitios
80 of land hereinbefore described, and sold by him to the said Hewetson on the seventh (7) day of May, eighteen hundred and thirty-nine (1839), and we, Maria Inez Davila and Abato Valdez, her husband, only children and sole heirs-at-law of the said Miguel Davila, do, by these presents, in consideration of the foregoing premises, release, alienate and convey all our right, title, and interest in and to the above and foregoing described eleven (11) sitios of land situated as aforesaid in the now counties of Milam and Bell and Williamson, in the State of Texas, to the said James Hewetson, his heirs and assigns, to have and to hold the same forever; and we hereby disclaim, by virtue of inheritance of our said father, Miguel Davila, all rights and title to the above and beforegoing described land, admitting that full, legal, and equitable title to said land was vested in the said James Hewetson by virtue of the sale of our said father Miguel Davila on the seventh (7) day of May, eighteen hundred and thirty-nine (1839), of said lands to the said Hewetson, as aforesaid, our said father, Miguel Davila, having departed this life on or about the fifth day of September, A. D. eighteen hundred and sixty-two
81 (1862). And further, in consideration of the premises, we do hereby make, constitute, and appoint the said James Hewetson and his attorney in fact, William Alexander, either of whom may act separately and by substitute, our true and *and* lawful attorneys in fact, for us, in our names, stead, and behalf to do whatever we might do to secure and perfect the title and possession of said Hewetson to the eleven (11) sitios of land aforesaid. And whereas there is now pending in the circuit court of the United States for the western district of Texas, at Austin, a suit at law entitled Miguel Davila vs. William Young and others No. 629; and also another suit in said court entitled Miguel Davila vs. Mumford et al., No. 104, we do hereby declare that in our opinion the attorneys of record for our said father, Miguel Davila, deceased, in said suits did act and are acting without authority from him, and we do hereby fully authorize and empower either of our above-named attorneys in

fact, or such substitute as may be appointed by either of them, to take exclusive control of suits, and also of any other suits which may be pending in any court in said State of Texas in which we are or may be interested by virtue of inheritance from our said father, Miguel
82 Davila, deceased, and to prosecute them, or compromise any or either of them for the use and benefit of the said Hewetson as fully as we might do, even we present and acting, it being our intention to confer upon our attorney in fact the amplest powers possible, which we do hereby declare irrevocable, and to ratify fully what they or either of them may do in the premises to secure the title and possession to said eleven (11) sitios of land.

In witness whereof we have hereto set our hands and seals, authorizing a suitable U. S. revenue stamp to be affixed and cancelled, this the twenty-eighth day of September, A. D. eighteen hundred and sixty-nine (1869).

Por orden de in madre, polotice, Da. Ma. Inez Davila y Abato Valdez.

JESUS CARDENAS.

her
MARIA INEZ + DAVILA.
mark.

his
ABATO + VALDEZ.
mark.

Signed, sealed, and delivered in the presence of the undersigned, each of whom is also witness to the signature of the other—

W. N. HARDEMAN.
A. E. CAROTHERS.
J. D. CAROTHERS.

83 STATE OF TEXAS,
Williamson County:

I, Levi Pennington, clerk of the county court for said county, hereby certify that the foregoing and attached instrument of writing was filed for record on the 9th day of December, A. D. 1876, at 8 o'clock a. m., and was correctly recorded on the 12th day of December, A. D. 1876, in vol. 18 of the record of deeds for said county, on pages 4, 5, 6 & 7.

To certify which I hereunto set my hand and official seal, at office in Georgetown, this 12th day of December, A. D. 1876.

[L. S.] LEVI PENNINGTON, *Clerk*,
By , *Deputy*.

STATE OF TEXAS,
County of Milam:

I, J. C. Rogers, clerk of the county court in and for said county, do hereby certify that the foregoing instrument of writing was duly and correctly recorded in my office on the 9th day of November, 1876, at 2 o'clock p. m., in record book C, page 289, 290, 291 & 292.

In witness whereof I hereto sign my name and affix the seal of said court, at office in Cameron, this 9th day of Nov'r, 1876.

J. C. ROGERS,
Clerk of County Court, Milam Co., Texas,
By J. W. HOOD, *Deputy.*

84 THE STATE OF TEXAS,
County of Bell:

I, W. G. W. Stone, clerk of the county court of said county, do hereby

certify that the foregoing and attached deed or instrument of writing was filed for record in my office on the 27th day of November, A. D. 1876, at 10½ o'clock a. m., and was duly recorded by me in book 27 of the record of deeds, mortgages, etc., in and for said county, on pages 119, 120, and 121, this the 27th day of November, A. D. 1876, at 5 o'clock p. m.

Witness my hand and the impress of my official seal, at office in Belton, the date last above written.

[L. S.] W. G. W. STONE,
Clerk County Court Bell County, Texas.
By HENRY HOELZCLAW, *Deputy.*

Consulate of the United States of America at Saltillo, State of Coahuila, Republic of Mexico.

Before me, John D. Carothers, consul of the United States of America of Saltillo and the dependencies thereof, personally appeared Abato Valdez, to me well known, and acknowledged the annexed and foregoing deed or writing, bearing date on the 28th day of September, A. D. 1869, to be his act and deed, and that he executed the same for the con-
85 sideration and purposes therein stated; to certify which I hereto sign my name and affix my seal this 21st day of September, A. D. 1876.

[L. S.] J. D. CAROTHERS,
U. S. Consul.

No. 10, $2.00.

Consulate of United States of America at Saltillo, State of Coahuila, Republic of Mexico.

Before me, John D. Carothers, consul of the United States of America for Saltillo and the dependencies thereof, personally appeared Maria Ines Davila, to me known, wife of Abato Valdez, parties to a certain deed of writing, bearing date on the twenty-eighth day of September, A. D. 1869, and hereto annexed, and having been examined by me privily, and apart from her husband, and having the same fully explained to her, she, the said Maria Ines Davila, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it; to certify which, I hereto sign my name and affix my seal, this twelfth day of September, A. D. 1876.

[L. S.] J. D. CAROTHERS,
U. S. Consul.

No. 1—$2.00.

86 To the reading of which deed in evidence the defendants objected, on the ground that the same appears upon its face to be a married woman's deed, signed in 1869, while this suit was instituted in 1874, & the privy examination of the woman did not take place till 1876. That said deed was void when the suit was instituted & had not passed the fee in the land mentioned therein, & which is in controversy, and that until the privy acknowledgement, the deed of, to said married woman was a nullity, the privy acknowledgement being necessary to show her title, & that it is therefore inadmissible; which objection being heard, was by the court sustained, & said deed excluded from the jury as evidence; to which ruling of the court the pl'ff then & there in open court,

& when said ruling was made, excepted thereto, and time being given to prepare the bill, embodying the exception, the same is now prepared & presented to the court for allowance.

III.

And be it further remembered, that during the further progress of this trial, and when the trial had progressed as far and in the manner recited in the I & II subdivisions of this bill, it was agreed
87 and admitted as follows, by the pl'ff's & def'ts, endorsed, to wit: "G. J. Hollingsworth vs. No. 1579. Flint & Chamberlain. Admissions of parties. Filed March 5, 1877. M. Hopkins, cl'k."

In words following:

Agreement & admission of parties.

THOMAS J. HOLLINGSWORTH }
vs.
FLINT & CHAMBERLAIN. }

It is admitted by and between the parties to this suit, for the purposes of this trial, that James Hewetson, the grantee in the deed from Davila, of the date 7th day of May, 1839, and in the deed from Maria Ines Davila and her husband, Abato Valdez, dated the 28th day of September, 1869, offered in evidence in this cause and ruled out by the court, is now dead; that he died on day of September, 1870; and it is further admitted by and between the parties to this suit that James Hewetson, Margaret Hewetson, Honora Hewetson and Bridget Maria Jenks, are and were at the time of the decease of said James Hewetson, deceased, the nephew and *neices* of the said James Hewetson, deceased, and his nearest of kin, and the only ones of that degree living at
88 that time he died, and that they and Joseph C. Jenks, husband of the said Bridget Maria Jenks, are the same who executed the deed from them to Bethel Coopwood, Barnes Parker, Francis M. Chandler, Thomas J. Hollingsworth, and Henry A. Lewis, dated on the 18th day of September, 1873, which is offered in evidence by the plaintiff in this trial, and *and* objected to by defendants.

BETHEL COOPWOOD,
Att'y for Pl'ff.
E. J. GURLEY,
Att'y for Def'ts.

Whereupon the pl'ff offered in evidence the following deed to him for the land in controversy, viz:

89 *Deed to Thos. J. Hollingsworth.*

THE STATE OF NEW YORK,
City and County of New York:

Know all men by these presents, that we, James Hewetson, Margaret Hewetson, and Honora Hewetson, of the city, county, and State aforesaid, and Bridget Maria Jenks, of Williamsburg, Long Island, State aforesaid, all the legitimate children of Thomas Hewetson, deceased, and only legal heirs of James Hewetson, late of the city of Saltillo, State of Coahuila, Mexico, deceased; and Joseph C. Jenks, of said Williamsburg, husband of the said Bridget Maria Jenks, in consideration of four thousand dollars to us paid, as follows, to wit: by Bethel Coopwood, of Eagle Pass, county of Maverick, State of Texas, fifteen hundred dollars; by Barnes Parker and Francis M. Chandler, of the city of Austin, Travis County, Texas, fifteen hundred dollars; and by

Thomas J. Hollingsworth, of Vondenburg County, State of Indiana, and Henry A. Lewis, of the city of Austin, Travis County, State of
90 Texas, one thousand dollars; have granted, bargained, sold and released, and by these presents do grant, bargain, sell, and release, unto the said Bethel Coopwood, Barnes Parker, Francis M. Chandler, Thomas J. Hollingsworth, and Henry A. Lewis all of the lands, real estate, land-warrants, land-certificates, and claims to land, real estate, and land-certificates, which belonged to the said James Hewetson, deceased, in the State of Texas at the time of his decease, or to which he was then in any wise entitled in said State of Texas, and all moneys or other property arising out of any such sale or sales of such property since the death of the said James Hewetson, deceased, together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging or in any wise incident or appertaining; to have and to hold all and singular the premises aforesaid unto the said Bethel Coopwood, Barnes Parker, Francis M. Chandler, Thomas J. Hollingsworth, and Henry A. Lewis, their heirs and assigns forever; and we do hereby bind ourselves, our heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Bethel Coopwood, Barnes Parker, Francis M. Chandler, Thomas J. Hollingsworth, and Henry A. Lewis, their heirs and
91 assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof, by, through, or under us, or either of us; and we do hereby covenant to and with the said Bethel Coopwood, Barnes Parker, Francis M. Chandler, Thomas J. Hollingsworth, and Henry A. Lewis, that we are the only lawful heirs of the said James Hewetson, deceased; that we have not heretofore granted, bargained, sold, released, or aliened, or in any way whatever incumbered the said premises, or any part thereof, and that we hereby convey the whole thereof to them, free from any incumbrance whatever made by our act or deed.

Witness our hands and scrolls for seals this eighte'nth day of September, one thousand eight hundred and seventy-three.

his
JAMES + HEWETSON. [L. S.]
mark.
MARGARET HEWETSON. [L. S.]
HONORA HEWETSON. [L. S.]
BRIDGET MARIA JENKS. [L. S.]
JOSEPH C. JENKS. [L. S.]

Signed, sealed, and delivered in presence of—
FRANCISCO FESSER.
WM. V. ARCHER.

THE STATE OF NEW YORK,
City and County of New York, ss:

Before me, Wm. V. Archer, a commissioner for the State of Texas, duly appointed, commissioned, and qualified, personally appeared
92 James Hewetson, Margaret Hewetson, Honora Hewetson, Bridget Maria Jenks, and Joseph C. Jenks, proven to me by the oath of Francisco Fesser, LL. D., Sister Mary Augustine MacKenna, mother superior of the Convent of Mercy, in said city, and Sister Mary Aloysious Grant, of the same institution, all good and credible witnesses, and residents of said city and county, to be the identical persons described in and who executed the foregoing deed of writing, bearing date the eighteenth day of September, A. D. 1873; and they, the said James Hewetson, Margaret Hewetson, Honora Hewetson, Brid-

get Maria Jenks, and Joseph C. Jenks, acknowledged that they had executed the same for the consideration and purposes therein stated; and the said Bridget Maria Jenks, wife of the said Joseph C. Jenks, having been examined by me privily and apart from her husband, and having the same fully explained to her, acknowledged the same to be her act and deed, and declared that she had willingly signed and delivered the same, and that she wished not to retract it: to certify all of which, I hereto sign my name and affix my seal of office, at the city aforesaid, this eighteenth day of September, A. D. 1873.

[L. S.] WM. V. ARCHER,
Com'r for Texas in New York.

93 THE STATE OF TEXAS,
County of Refugio:

I, R. P. Clarkson, clerk of the district court of Refugio County, do hereby certify that the foregoing conveyance, with its certificates of authentication, both dated the 18th day of September, 1873, were filed for registration in my office on the 31st day of October, 1873, and were duly recorded on the 31st day of October, 1873, at 12 o'clock m., in Book J, pages 288, 289, and 290 of the records of Refugio.

To certify which, witness my hand and the seal of the district court of Refugio County, at office in Refugio, this the 31st day of October, 1873.

[L. S.] R. P. CLARKSON,
Clk D. C. R. C.

THE STATE OF TEXAS,
County of Aransas:

I, Edward S. Winsor, clerk of the district court of Aransas County, do hereby certify that the instrument of writing hereto attached, with its certificates of authentication & record, was filed for record in my office the 1st day of November, A. D. 1873, at 4 o'clock p. m., and duly recorded the 4th day of November, A. D. 1873, at 11 o'clock a. m.,
94 in Book B, No. 259, page 383, of the records of Aransas County.

To certify which, witness my hand and official seal, at office in the city of Rockport, the day and year last above mentioned.

E. S. WINSOR,
Clerk D. C. A. C.,
By MATH. TALBOTT, JR., *Deputy.*

THE STATE OF TEXAS,
County of Bell:

I, James Leach, clerk of the district court in and for said county, hereby certify that the foregoing and attached deed or instrument of writing was filed for record in my office on the 16th day of January, A. D. 1874, at 9 o'clock a. m., and was duly recorded by me in Book T of the records of deeds, mortgages, &c., for Bell County, on pages 332, 333, 334, & 325, this the 16th day of January, A. D. 1874, at 1 o'clock p. m.

Given under my hand and seal of office this the date last above written.

JAMES LEACH,
Clerk District Court, Bell County, Texas,
By R. H. TAYLOR,
Deputy.

(On the margin) Endorsement cont'd, to wit: Filed for record the 10th July, 1874, at 8 o'clock a. m. Walter A. Patrick, cl'k D. C. L. C. Fee, $2.00.

THE STATE OF TEXAS,
County of Milam:

I, J. Nabours, clerk of the district court in and for said county, do certify that the foregoing instrument of writing, together with
95 the certificate of authentication, was filed in my office for record this 19th day of June, 1874, at 8 o'clock a. m., and was duly recorded the 25th day of June, 1874, at 9 o'clock a. m, in Book A 2d, on pages 295 and 296.

Witness my official signature and seal of office this 25th day of June, A. D. 1874.

J. NABOURS,
Clerk D. C. M. Co.,
By ROBT. HOMEEN,
Deputy.

THE STATE OF TEXAS,
County of Leon:

I, Walter A. Patrick, clerk of the district court of Leon County, Texas, certify that the foregoing and hereto attached deed of conveyance from Jas. Hewetson et al. to Bethel Coopwood et al., dated 18th day of September, 1873, duly authenticated, was filed in my office for record this 10th day of July, 1874, at 8 o'clock, and duly recorded 10th day of July, 1874, at 9 o'clock, in book L, pages 528 & 529, Leon County records for deeds, &c.

Witness my hand and official seal this the 10th day of July, 1874.

[L. S.] WALTER A. PATRICK,
Clerk District Court Leon County.

Endorsements, to wit: "Deed Jas. Hewetson et al. to Bethel Coopwood et al. Filed for record in my office, in city of Rockport, on 1st day of November, A. D. 1873, at 4 o'clock p. m. E. S. Winson, clerk D. C. A. C., by Matt Talbot, jr., deputy.

"Filed for record Jan'y 16, 1874, at 9 o'clock a. m. Jas. Leach, cl'k D. C. B. C. Record $2.00. Filed in 1577, 1578, 1579, 1580, 1581, 1582, 1583, 1584, 1585, 1586, 1587, 1588. Thos. J. Hollingsworth v. Samuel Jenkins et others. Dec. 12, 1874. M. Hopkins, cl'k.

96 To the reading of which deed in evidence the def'ts objected, on the ground that it was irrelevant at this stage of the case, as the pl'ff had failed to connect himself with the sovereignty of the soil, and pl'ff's declining to state that he expected to show any other title than that already offered; which objection, being heard by the court, was sustained, and said deed excluded as evidence from the jury; to which ruling of the court, the pl'ff then & there in open court, & when said ruling was made excepted; & time being given to embody said exception in a bill, this bill is now prepared & presented to the court for allowance.

IV.

And be it further remembered, that during the further progress of this trial, & when the same had progressed as far & in the manner recited in the foregoing subdivisions of this bill, it was admitted by the defendants that they were in possession of the land sued for at the time the suit was instituted; whereupon the court, of its motion, directed the jury to find a verdict for the defendants, as the pl'ff, under the
97 rulings of the court, had failed to show any title to himself in the land sued for; to which direction of the court the pl'ff then &

there at the time, in open court, & in the presence of the jury, excepted; and time being given to prepare a bill to embody said exception, this bill is now prepared for allowance. And, the pl'ff praying that this his bill, e'bodying four subdivisions, be allowed, signed, sealed, & made part of the record, the same is accordingly so done.

T. H. DUVAL, [SEAL.]
U. S. Judge.

Special bill of exceptions to the order of the court overruling the motion for new trial is in words, to wit:

98 *Special bill of exceptions.*

T. J. HOLLINGSWORTH
vs. } No. 1579.
FLINT AND CHAMBERLAIN.

Be it remembered that upon the trial of this cause, and after the trial thereof had proceeded as far as and in the manner recited in the pl'ff's bill of exceptions already signed, sealed, and made part of the record of this cause, to which reference is here craved, making the same a part hereof, and after the verdict of the jury had been returned into court, and within two days from and after the return of said verdict into court, the plaintiff moved the court to grant him a new trial in this cause, upon the grounds set forth in his written motion, which is in words as follows, endorsed, to wit: "In U. S. circuit court, Austin. Hollingsworth vs. Flint & Chamberlain. Motion for new trial."

Which is in words as follows:

THOMAS J. HOLLINGSWORTH
vs. } No. 1579.
D. F. CHAMBERLAIN.

99 And now comes the plaintiff and moves the court to grant him a new trial in this cause on the following grounds:

1st. That the court erred in each of its several rulings made upon the trial of this cause, and which are set out and excepted to by plaintiff in his bill of exceptions now on file in this cause.

2nd. That the court erred in each of its several instructions given to the jury in the trial of this cause, and which are recited and excepted to in plaintiff's said bill of exceptions so on file.

3rd. The verdict of the jury is against the law and the evidence.

F. W. CHANDLER,
BETHEL COOPWOOD,
WALTON, GREEN & HILL,
Att'ys for Plaintiff.

And the said motion coming on to be heard, after hearing the same and argument of counsel, the court adjudged the law to be with the defendants and against the plaintiffs and overruled the said motion; to which ruling of the court the plaintiff then and there in open court, and at the time such ruling was so made, excepted; and time being granted to prepare a bill embodying such exception, this bill is now prepared and tendered for allowance in open court, and plaintiff prays that the same be allowed and signed, sealed, and made a part of the record of this cause, which is accordingly done.

T. H. DUVAL, [L. S.]
U. S. Judge.

100 Application for writ of error, endorsed to wit: "No. 1579. Hollingsworth vs. Flint & Chamberlain. Application for writ of error. Filed March 21, 1877. M. Hopkins, cl'k."

Which is in words as follows:

Application for writ of error.

United States circuit court for the western district of Texas, at Austin.

THOMAS J. HOLLINGSWORTH
vs.
JOHN T. FLINT AND D. T. CHAMBERLAIN. } No. 1579.

The petition of Thomas J. Hollingsworth, plaintiff herein, respectfully represents: That he is ag'rieved by the judgment herein rendered against him on the fifth day of March, A. D. 1877, and that there is error therein to his prejudice and damage; wherefore he prays that a writ of error be allowed him therefrom, returnable to the next term of the Supreme Court of the United States, and that the same may operate as a supersedeas on his giving bond and security, conditioned according to law, in such sums as the court may direct.

And he will ever pray, &c.

F. W. CHANDLER,
BETHEL COOPWOOD,
WALTON, GREEN & HILL,
Attorneys for Plaintiff.

101 On same day the following paper was filed, endorsed to wit: "1579. Thos. J. Hollingsworth vs. Flint & Chamberlain. Bond for writ of error. Filed March 21, 1877. M. Hopkins, cl'k"—

In words following:

Bond for writ of error.

United States circuit court, for the western district of Texas, at Austin.

THOMAS J. HOLLINGSWORTH
vs.
JOHN T. FLINT AND D. T. CHAMBERLAIN. } No. 1579.

Know all men by these presents, that we, Thomas J. Hollingsworth, plaintiff in the above-entitled cause, as principal, and Barnes Parker and Francis M. Chandler as sureties, are held and firmly bound unto D. T. Chamberlain, defendant in said cause, in the full sum of seven hundred and fifty dollars, to be paid to the said D. T. Chamberlain, his certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated this twenty-first day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas the above-named and bounden Thomas J. Hollings-
102 worth hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the western district of Texas, at Austin:

Now, therefore, the condition of the above obligation is such, that if the said Thomas J. Hollingsworth shall prosecute his writ of error to effect and answer all damages and costs if he fail to made his plea good,

then the above obligation to be void, else to remain in full force and virtue.

T. J. HOLLINGSWORTH, [L. S.]
By F. W. CHANDLER, *His Att'y.*
F. M. CHANDLER. [L. S.]
BARNES PARKER. [L. S.]

Signed, sealed, and delivered in the presence of—
M. HOPKINS.

Approved March 21st, 1877.

T. H. DUVAL,
U. S. Judge.

In the Supreme Court of the United States, Thomas J. Hollingsworth, pl'ff in error, vs. Flint & Chamberlain, def't in error. Writ of
103 error. To Supreme Court of the United States. Issued 19 day of March, A. D. 1877. M. Hopkins, cl'k.
Which is in words as follows:

Writ of error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the circuit court of the United States, 5th circuit, in and for the western district of Texas, holding sessions at Austin, in said district, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said circuit court, before you, between Thomas J. Hollingsworth, who is plaintiff, and John T. Flint and D. T. Chamberlain, who are defendants, No. 1579 on the docket of said circuit court of the United States, sitting at Austin, in said district, a manifest error hath happened, to the great damage of the said Thomas J. Hollingsworth, who is plaintiff in error herein, as by his complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record
104 and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington the second Monday of October next, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court, the 19th day of March, in the year of our Lord one thousand eight hundred and seventy-seven, and seal our said circuit court, at Austin, in the 101 year of the Independence of the United States.

[L. S.]

M. HOPKINS,
Clerk of the Circuit Court of the United States,
West. Dist. of Texas, at Austin.

Allowed by—

T. H. DUVAL,
U. S. Judge.

In Supreme Court of the United States. Thomas J. Hollings-
105 worth, pl'ff in error, vs. Flint & Chamberlain, def'ts in error. Citation in error. Issued 19 day of March, A. D. 1877. M. Hopkins, C. C. C. U. S., Austin, Tex.

Which is in words as follows:

Citation in error.

UNITED STATES OF AMERICA:

To John T. Flint & D. T. Chamberlain, or their attorneys of record, Terrell & Walker, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein Thomas J. Hollingsworth is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 19 day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

[L. S.] T. H. DUVAL,
U. S. Judge.

Test, with seal of court, at Austin, this 19th day of March, A. D. 1877.
M. HOPKINS,
Clerk.

106 Upon which is endorsed the marshal's return, in words as follows:

Received this writ in office at Austin this 5th day of September, 1877, and served same this 5th day of September, 1877, by delivering to A. S. Walker, of the firm of Messrs. Terrell & Walker, attorneys of record in the within styled suit, in person, a true copy of this writ.

THOMAS F. PURNELL,
U. S. Marshal W. D. Tex.,
By E. HUPPERTZ, *Dep.*

I, Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, do hereby certify that the foregoing pages, numbered from 1 to 106, contain a full and true transcript of the record and all the proceedings had in case No. 1579, entitled Thomas J. Hollingsworth vs. Jno. T. Flint & D. T. Chamberlain, as they appear of file and record in this court.

In testimony whereof I have hereunto set my hand and the impress of the seal of said court, at Austin, this 25th day of September, A. D. 1877.

[SEAL.] M. HOPKINS, *Clk.*

(Indorsement on cover:) No. 217. Thomas J. Hollingsworth, plaintiff in error, vs. John T. Flint & D. T. Chamberlain. W. Texas C. C. U. S. Filed 3rd October, 1877.

OFFICE SUPREME COURT U. S.
FILED
MAR 15 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the U. S.

No. 217.

THOMAS J. HOLLINGSWORTH

vs.

JOHN D. FLINT ET AL.

Brief for Plaintiff in Error.

P. PHILLIPS,
BETHEL COOPWOOD,
W. HALLETT PHILLIPS,
For Plaintiffs in Error.

R. O. Polkinhorn, Printer, Washington, D. C.

105 In Supreme Court of the United States. Thomas J. Hollingsworth, pl'ff in error, vs. Flint & Chamberlain, def'ts in error. Citation in error. Issued 19 day of March, A. D. 1877. M. Hopkins, C. C. C. U. S., Austin, Tex.

Which is in words as follows:

Citation in error.

UNITED STATES OF AMERICA:

To John T. Flint & D. T. Chamberlain, or their attorneys of record, Terrell & Walker, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the western district of Texas, 5th circuit, sitting at Austin, wherein Thomas J. Hollingsworth is plaintiff and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 19 day of March, in the year of our Lord one thousand eight hundred and seventy-seven.

[L. S.] T. H. DUVAL,
U. S. Judge.

Test, with seal of court, at Austin, this 19th day of March, A. D. 1877.
M. HOPKINS,
Clerk.

106 Upon which is endorsed the marshal's return, in words as follows:

Received this writ in office at Austin this 5th day of September, 1877, and served same this 5th day of September, 1877, by delivering to A. S. Walker, of the firm of Messrs. Terrell & Walker, attorneys of record in the within styled suit, in person, a true copy of this writ.

THOMAS F. PURNELL,
U. S. Marshal W. D. Tex.,
By E. HUPPERTZ, *Dep.*

I, Matthew Hopkins, clerk of the circuit court of the United States in and for the western district of Texas, at Austin, do hereby certify that the foregoing pages, numbered from 1 to 106, contain a full and true transcript of the record and all the proceedings had in case No. 1579, entitled Thomas J. Hollingsworth vs. Jno. T. Flint & D. T. Chamberlain, as they appear of file and record in this court.

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STATEMENT.

This is an action of trespass to try title, instituted in the United States Circuit Court for the Western District of Texas, at Austin, to recover eleven leagues of land situated in Bell, Milam, and Williamson Counties, on the right bank of the San Andres River, its boundaries, lines, and landmarks being given in the petition. (R., p. 1.)

Flint, one of the defendants, filed a disclaimer of title. (R., p. 3.)

Chamberlin plead the statute of limitation as to part, and disclaimer as to the residue of the demanded premises. (R., p. 7.)

On the trial the plaintiff produced and read in evidence, without objection, the original grant of the land in controversy to Miguel Davila, consisting of the following:

1st. Application to the Alcalde of the Villa de San Felipe de Austin, for personal possession of eleven leagues of land

by virtue of a concession thereof made to Davila by the executive of the State on the 13th of July, 1830. (R., p. 10; Translation, R., p. 13.)

2d. Order of Lesassier approving the application, and referring it to Austin and Williams for their approval, and that it be thereafter forwarded to the surveyor for survey of the lands. (R., p. 10; Translation, R., p. 14.)

3d. Approval by Austin and Williams. (R., p. 10; Translation, R., p. 14.)

4th. Field notes of the survey. (R., p. 11; Translation, R., pp. 14, 15.)

5th. Original testimonio of the concession of eleven leagues of land to Davila, consisting of Davila's petition therefor and decree of the executive of the State of Coahuila and Texas, granting the same, dated July 13th, 1830, which testimonio was issued by the Secretary of State on the 14th of July, 1830. (R., p. 10; Translation, R., pp. 15, 16.)

6th. Original final title, extended by Lesassier, Alcalde constitutional of the Villa de San Felipe de Austin, on the 18th of October, 1833, granting to Davila the eleven leagues of land described in the said field notes (the same also described in plaintiff's petition), by virtue of the said concession of July 13th, 1830. (R., pp. 12, 13; Translation, R., pp. 16, 17.)

Then plaintiff offered in evidence, in connection with the title-papers, already read in evidence, a deed from Miguel Davila to Hewetson, in which Davila says "that hereby and in the most legal form prescribed by law, in the exercise of the rights in him vested in the premises, for himself and in the name of his heirs and assigns, or any one claiming right, title, or interest therein through him or them, acknowledges that he sells and conveys, by public instrument and in fee simple forever, to Don Santiago Hewetson, to wit, eleven leagues of land, obtained from the public domain by

virtue of a permit issued for them to him by the executive of the State of Coahuila and Texas, by order of July 13th, 1830; which leagues are situated ten on the waters of the creek called Choctaw of the Red River, and the eleventh between Sulphur Fork Creek of Red River and the south fork of said creek, distance," etc. (R., pp. 18, 19. Translation of deed, R., pp. 21, 22.)

To the admission of which deed the defendant objected on the ground that it did not convey the land in controversy, and was, therefore, irrevalent and inadmissible. (R., pp. 28, 29.)

And, at request of defendant, the court below considered, in connection therewith, an instrument purporting to be a certified copy of a grant, which consisted of the following:

1st. A copy of the concession to Davila, consisting of the petition of Davila therefor, and the decree of the executive, dated July 13th, 1830, granting the same, which copy purports to have been issued on the 4th of January, 1834, by T. Antonio Padilla, secretary. (R., pp. 23, 24.)

2d. A copy of what purports to be a power of attorney from Davila to James Hewetson, dated on the 17th of May, 1834. (R., pp. 24, 25.)

3d. A copy of what purports to be a substitution from Hewetson to M. B. Menard, dated June 5th, 1834. (R., p. 25.)

4th. A copy of what purports to be a revocation of Menard's substitution, and a substitution of Cameron by Hewetson, dated May 24th, 1835. (R., pp. 25, 26.)

5th. A copy of what purports to be an application of John Cameron, as attorney of Miguel Davila, to a Commissioner (not named) to issue, as special commissioner, a title to eleven leagues of land, which his constituent had

bought of the supreme government of the State of Coahuila and Texas, etc., which application is dated January 10th, 1836. (R., p. 26.)

6th. A copy of what purports to be the approval of the application by Vicente Aldrete, dated January 29th, 1836. (R., p. 26.)

7th. A copy of what purports to be the field notes of a survey of ten leagues of land, dated November 3d, 1835, and of the eleventh league, dated July 27th, 1835, each signed—Geo. Aldrich, surveyor. (R., p. 27.)

8th. A copy of what purports to be an order of Vicente Aldrete, that the corresponding title issue, dated January 30th, 1836. (R., p. 27.)

9th. A copy of what purports to be a final title, issued by Aldrete as special commissioner, dated January 30th, 1836. (R., p. 28.)

10th. Certificates of the translator and commissioner of the general land office of the State of Texas. (R., p. 28.)

And the court, having heard the objection, sustained the same, and excluded the deed from going to the jury as evidence; and plaintiff duly excepted. (R., p. 29.)

Plaintiff then read in evidence an agreed admission of plaintiff and defendants, that Maria Ines Davila, who, with her husband, Abato Valdez, executed to James Hewetson the deed of confirmation dated —— day of ———, A. D. 1869, was and is legitimate daughter of Miguel Davila, to whom the eleven leagues of land in controversy in this suit were originally granted by the State of Coahuila and Texas; and that this admission and agreement may be read in evidence on the trial of this cause by or on part of either of the parties, plaintiff or defendants, the deed of confirmation referred to being on file in this cause. (R., p. 29.)

Whereupon the plaintiff offered in evidence a deed of

confirmation from Maria Ines Davila and Abato Valdez, her husband, to James Hewetson, relating the sale by her father to said Hewetson of the concession of eleven leagues of land made to him on the 13th day of July, 1830, by the government of the State of Coahuila and Texas, and a mistaken description thereof in the deed from her father to Hewetson, of date 7th of May, 1839, and fully confirming such sale as to the demanded premises by full description, and disclaiming, as sole heir of Davila, all rights and title to the same by inheritance, to said Hewetson; admitting that full, legal, and equitable title to said land was vested in the said Hewetson by virtue of the sale of Miguel Davila on the 7th day of May, 1839, of said lands to the said Hewetson, Miguel Davila having departed this life about the 5th of September, 1862, &c. (R., pp. 29–31.)

To the reading of this deed of confirmation in evidence the defendants objected, on the ground that the same appears upon its face to be a married woman's deed, signed in 1869, while this suit was instituted in 1874, and the privy examination of the woman did not take place till 1876; that said deed was void when the suit was instituted and had not passed the fee in the land mentioned therein, and which is in controversy, and that until the privy acknowledgment the deed of said married woman was a nullity, the privy acknowledgment being necessary to show title, and that it is, therefore, inadmissible; which objection the court sustained and excluded the deed from the jury, and the plaintiff duly excepted. (R., pp. 29–33.)

The plaintiff then read in evidence the agreed admissions of the parties that James Hewetson, the grantee named in the deed from Davila, of date 7th of May, 1839, and in the deed from Maria Ines Davila and her husband, Abato Valdez, dated 28th of September, 1869, offered in evidence and excluded, is now dead; that he died on day of September, 1870; and that James Hewetson, Margaret Hewetson,

Hornora Hewetson, and Bridget Maria Jenks, are and were at the time of the decease of said James Hewetson, deceased, the nephew and neices of the said James Hewetson, deceased, and his nearest of kin, and the only ones of that degree living at the time he died; and that they and Joseph C. Jenks, husband of the said Bridget Maria Jenks, are the same who executed the deed from them to Bethel Coopwood, Barnes Parker, Francis M. Chandler, Thomas J. Hollingsworth, and Henry A. Lewis, dated on the 18th day of September, 1873, which is offered in evidence by the plaintiff and objected to (R., p. 33); and plaintiff then offered to read this deed conveying from the said grantors to plaintiff and the grantees therein named, all of the lands, real estate, land-warrants, land-certificates, and claims to land, real estate, and land-certificates which belonged to the said James Hewetson, deceased, in the State of Texas, at the time of his decease, or to which he was then in anywise entitled in said State of Texas, &c. (R. pp. 33, 34.)

To the reading of this deed in evidence the defendant objected, on the ground that it was irrelevant at this stage of the case, as plaintiff had failed to connect himself with the sovereignty of the soil, and declined to state that he expected to show any other title than that already offered; which objection was sustained, and said deed excluded, and plaintiff duly excepted. (R., p. 36.)

The defendants then admitted that they were in possession of the land sued for at the time the suit was instituted. (R., p. 36.)

Thereupon the court below instructed the jury, of its own motion, to find a verdict for the defendants, as the plaintiff, under the ruling of the court, had failed to show any title to himself in the land sued for, to which instruction of the court the plaintiff duly excepted. (R., pp. 36, 37.)

There was a general verdict and judgment for defendants, and the plaintiff brings the cause here by writ of error.

Assignment of Errors.

The plaintiff in error now assigns for error—

First. The ruling of the court excluding the deed from Davila to Hewetson.

Second. The ruling of the court excluding the deed of confirmation from Maria Ines Davila and her husband to Hewetson.

Third. The ruling of the court excluding the deed from the heirs of Hewetson to the plaintiff.

Fourth. The direction of the court to the jury to find a verdict for the defendants.

The first question arising under the first error assigned is, whether the court below rightly excluded the deed from Davila to Hewetson; by excluding the deed, the court took away plaintiff's standing in *judicio*.

Deery vs. *Cray*, 5 Wall., 807.

By this deed Davila, in the exercise of the rights in him vested in the premises, for himself and heirs, and any one claiming right, title, or interest therein, through him or them, sells and conveys in fee simple forever to Hewetson, to wit: "eleven leagues of land obtained from the public domain by virtue of the concession of July 13th, 1830," which concession and its accompanying final title papers, read in evidence without objection, perfectly grants to him the demanded premises, which are all he could, and the only land he did acquire *by virtue of such concession.*

"The rule is, that if the description be sufficient to ascertain the land intended to be conveyed, the land will pass,

although it does not agree with some of the particulars of the description."

Worthington vs. *Hyler* 4 Mass., 206;
Parker vs. *Kane*, 20 How., 18.

In this deed there is enough to show that the land intended to be conveyed was that actually acquired by the original concession, to which there is a direct reference, and the land thereby acquired being the demanded premises, the circumstance that it is described as being on other streams, with its boundaries defined in other pretended but void and impossible title-papers, should be rejected as false and mistaken.

Lyman vs. *Loomis*, 5 N. H., 409, 410;
Lush vs. *Drush*, 4 Wend., 318, 319.

The deed granting the eleven leagues, acquired *by virtue of the concession*, it conveyed the land so acquired according to its real boundaries. In *Jackson* vs. *Marsh* (6 Cow., 282), the court say:

"Where the patent grants Subdivision No. 2, it conveys that lot according to its real boundaries."

And the boundaries, as particularly stated in the patent not embracing the lot, were rejected, and the patent held to pass the lot named.

The granting clause in the deed is the eleven leagues acquired from the public domain by virtue of the original concession of July 13th, 1830, with an attempt to more particularly describe it. The designation of the land as that acquired by the executive grant or permit must be regarded as the prominent object or monument, and if there is uncertainty, this monument should prevail. There is nothing to show any reservation whatever, or that it was intended in the conveyance to exclude any part of the land

actually and legally acquired from the public domain by virtue of the concession; and, without overthrowing well-established principles of law, we are not at liberty to construe the deed otherwise than as passing title to the land so acquired.

Rutherford vs. *Tracy et al.*, 48 Mo., 327 to 329.

And the attention of the court is specially directed to the opinion of Judge WAGNER in the case last cited.

In *Newsom* vs. *Davis* (20 Texas, 425) the court say: "The objection taken by the plaintiff to the admission in evidence of the bond for title—that is, that it does not describe the land claimed by the plaintiff—clearly is not tenable. In describing the land sold and contracted to be conveyed, by the *name of the grantee*, and of the plaintiff's ancestor as assignee, *the quantity of land* and the county in which it is situated, so as certainly to identify it as the land described in the patent under which the plaintiff claims. The mere fact that in the bond it is spoken of as being 'on the west side,' and in the patent as situated 'south of the Guadalupe River,' is not sufficient discrepancy to cast doubt upon the identity of the land, where the description is so complete and certain in *other more important particulars*. There cannot be a doubt as to the identity of the land sued for and claimed by the defendant under his bond for title."

In the deed from Davila, these "*other more important particulars*" are very certainly stated. The *name of the grantee*, the *quantity*, the *officer granting, and date of the decree or concession by virtue of which he obtained the land* intended to be conveyed by the deed, are therein certainly stated, and this is a description by reference to the primitive title—the concession.

Clay vs. *Holbert*, 14 Texas, 204.

In *Ragsdale* vs. *Robinson*, (48 Texas, 395–396.) the court

say: "To have warranted the court in excluding the deed from the jury, as has been, in effect, decided by this court (*Kingston* vs. *Pickins*, 46 Tex., 99), it must have been able to say, from inspection of it, that it was absolutely void, or that it was for other and different land than that claimed by the plaintiff." And if the paper considered by the court below, at request of the defendants, had any validity or force, or effect, then, "whatever effect the court might believe it should have in determining whether the deed described any land at all, or if it did, in showing its proper locality, this effect could be attained only by the action of the jury on it, and such other testimony as might be submitted to them."

Id., 396, and *Kingston* vs. *Pickins*, 46 Texas, p. 101.

But if the court could consider the paper at the request of the defendant, to show that the deed did not convey the land legally acquired by virtue of the concession, then it is submitted that such paper is absolutely void and wholy incompetent as evidence of any character.

The law in force at the time, prohibited Davila from acquiring more than one eleven league grant.

Decree No. 16, Art. 24, Laws of Coahuila and Texas,
(Pas. Dig. Laws, Vol. 1, Art. 586.)

The copy of the concession attached to the papers shows it to have been obtained long after the real testimonio of the concession had been located and final title issued thereon, whereby the original was fully satisfied and rendered *functus officio*. The final title issued on the original testimonio of the concession, October , 1833, and the copy in the papers offered by defendants, issued June 5th, 1834.

The land office was closed on the 13th of November, 1835, and the issuing of titles was prohibited when these

papers purport to have been issued (Jan. 30th, 1836), and they are mere nullities.

Art. 14, Provisional Act, (Pas. Dig. Laws, Vol. 1, p. 27.)

And this act "was intended to go into operation immediately, and to require a cessation of all land operations all over the Republic."

Donaldson vs. *Dodd*, 12 Texas, 387–392.

And the tenth general provision of the Constitution of the Republic declares, that "all titles to land made since that act are and shall be null and void."

Pas. Dig. Laws, Vol. 1, p. 38.

A nullity "cannot be interposed as an impediment to any one in the prosecution or defense of any right, however small, and in whatever mode it may be presented."

Mason vs. *Russell's Heirs*, 1 Texas, 730.

As these papers, considered by the court below, at request of defendants, are mere nullities, and no land was ever obtained from the public domain by or through them, to hold them sufficient to exclude from the effect of Davila's deed the eleven leagues of land actually acquired by virtue of the concession, would render the deed inoperative and void, notwithstanding the fact that it was already shown that the demanded premises were actually acquired from the public domain by virtue of the concession referred to in the deed.

But further, these papers offered by, and considered at request of, defendants, purport to be copies of papers which the Commissioner of the General Land Office had no authority to certify to be read in evidence. "A paper to be entitled to admission into the General Land Office must have constituted an archive or record of some former office."

Paschal vs. *Perez*, 7 Texas, 356.

"A translation of a Spanish title is only admissible in

evidence upon the hypothesis that the original, if produced, would be legal evidence, without proof of its execution."

Hatchett vs. *Conner*, 30 Texas, 109, 110.

In these papers Aldrete purports to act as special commissioner, but no commission, appointment, or authority is shown in them, and if they were dated before the closing of the Land Office, they would, upon their face, be private acts, unauthorized by legal authority.

If the instrument is one of those by virtue of which performance can be required or demanded as often as the original is presented, or other instrument, the duplication of which can injure the opposite party, neither the officer, before whom it was passed, nor any other can give, of his own authority, any more than the first copy.

Escriche, vol. 2, p. 185, Instrumento Publico.

Such other officer can only give a valid copy with authority of the judge and citation of the party.

Smith vs. *Townsend*, Dallam Dig., 572.

If the original concession and title-papers are read where referred to, and these second papers where they are referred to, then we have two senses; one lawful and the other unlawful in the same deed, and that which is most agreeable to law should be preferred.

2 Black., 380; 6 Hill, 453.

In the construction of a grant the court will take into view the attendant circumstances, the situation of the parties, the state of the country, and the thing granted.

1 Hilliard Real Prop., 338; 10 Mass., 359;
3 " 352;

The ambiguity in this case arises from extrinsic proof which show that while the land described in the latter part of the deed of Davila was apparently acquired as stated, yet that *the only land which ever vested in Davila by virtue of the concession is the demanded premises.*

In *Jackson* vs. *Loomis*, the description was, "the farm on which I now dwell, being lot No. 17, in the first division of lands there, containing 100 acres, bounding west on land of I. C., northerly by a pond, easterly by lot No. 18, and southerly by lot No. 19, having a highway through it." There was a lot No. 17, bounded precisely as the description, yet it was decided that as the deed specified the grantor's farm, although it was not on lot No. 17 that description was sufficient to ascertain the estate intended to be conveyed. This on the principle that the lot was mentioned as descriptive of the *land* intended to be conveyed, and not the land descriptive of the lot.

Jackson vs. *Loomis*, 18 John., 84.

These cases rest upon the principle that where there is a grant of a *particular thing*, once sufficiently ascertained, the addition of an allegation, mistaken or false, respecting it, will not frustrate the grant.

Connelly vs. *Vernon*, 5 East., 51.

This doctrine is fully supplied by the Texas decisions.

Berry vs. *Wright*, 14 Tex., 273;
Early vs. *Sterrett*, 18 Tex., 116.

So when the deed was of the "Schermehorn Brickyard," giving the courses and distances, and the land did not asswer the description, it was held that the metes and bounds must give way to the intent to convey a particular tract.

The court say if the grant can be sufficiently a-certained to locate the land, the addition of any false or mistaken particulars may be rejected or disregarded. It is a general rule, they say, that when a deed describes land by courses and distances and also by known visible monuments, the latter govern, and natural will overcome artificial monuments. Where no monuments exist, resort must be had to the next most certain call of the deed. This is ordinarily courses and distances, but not invariably so. If there are other

more certain evidences of the intent of the parties, or it by a resort to courses and distances exclusively, the result is to frustrate the grant, whilst the description contains other matter to render the intent entirely certain, it is not an unbending rule that the call of courses and distances in a deed alone must be resorted to in the absence of natural or artificial monuments.

Seaman vs. *Hogesboom*, 21 Barb., 405.

By his deed Davila sells to Hewetson eleven leagues of land obtained from the public domain, *by virtue of a permit issued for them to him*, by the executive of the State of Coahuila and Texas, by order of July 13, 1830. The reference to the concession and the land vested in him by virtue thereof, makes the grant part of the deed and incorporates therein the title-papers as to said eleven leagues.

By the location, under the concession of the eleven leagues sued for, the concession became satisfied, and vested the land so located in Davila.

This grant of eleven leagues was the only land he did or could obtain by *virtue of the concession*, and by the deed are conveyed to Hewetson. The subsequent description as to the location of the land gives a description of other lands than those *vested in Davila by virtue of the concession*, and should, therefore, be rejected.

It is true the deed refers to a pretended title to the land described.. But on their face the title papers show that such location was obtained by procuring a copy of the concession which had already been satisfied, and, therefore, *functus officio*.

It has already been shown that Davila never obtained any land whatever from the public domain by virtue of this second copy and papers accompanying it.

It is something very different, therefore, from the eleven leagues vested in him by *virtue of the concession* which he conveys to Hewetson.

In construing a deed or any other written instrument, the court seeks to give effect to the intention of the party executing it.

It is not to be presumed that Davila intended to execute a deed for land to which he knew he had no title, nor that Hewetson would become the purchaser from him for a valuable consideration, and accept a conveyance for land to which he knew the grantor had no title.

Both of these parties were cognizant of the law, statutory and constitutional, that denounced the acquisition of a second grant. Besides, the change of government had utterly deprived the party from acquiring such second grant. The deed, it is to be remembered, was executed in 1839, three years after the change of government.

That it was a mere mistake in Davila in giving the boundaries is shown by the fact that his heir so declares.

We conclude by saying that the deed not being void, it was error in the court to have excluded it from the jury.

Farris vs. *Gilbert*, 50 Tex., 350.

Deed of Maria Inez Davila.

It is objected that the privy examination of Maria Inez Davila was subsequent to the time of bringing suit, and, therefore, the deed was a nullity, and inadmissible in evidence.

Art. 1003, Pasch. Dig. Laws, Tex., provides: "That when a husband and his wife have signed and sealed any deed or other writing purporting to be a conveyance of any estate or interest, in any land, slave or slaves, or other effects, the separate property of the wife, or of the homestead of the family, or other property exempted by law from execution, if the wife appear before any judge of the Supreme or District Court, or notary public, and—being

privily examined by such officer, apart from her husband—shall declare that she did, freely and willingly, sign and seal the said writing, to be then shown and explained to her, and wishes not to retract it; and shall acknowledge the said deed and writing, so again shown to her, to be her act, thereupon such judge or notary shall certify such privy examination and acknowledgment under his hand and seal, by certificate annexed to said writing, to the following effect or substance" (giving form of certificate.)

* * * * * *

"But any certificate showing that the requisites of the law have been complied with shall be as valid as the form here prescribed; and such deed or conveyance so certified, shall pass all the right, title and interest which the husband and wife, or either of them, may have in or to the property therein conveyed."

In answer to the objection we, say: First, the deed is not a conveyance of land the separate property of the wife. It shows on its face that it is only a confirmation of an estate previously granted by her father, Davila.

"A confirmation does not create an estate, it is the approbation or assent to an estate previously created.

Gil. Ten., 75.

Second. The law of Texas does not make the deed void for want of the acknowledgment.

This question was first decided in the case of *Womack* vs. *Womack*, by a unanimous court; the opinion being delivered by Chief Justice HEMPHILL.

He decides that a married woman holds her property by as perfect a title as does her husband, "and if the law," says he, "has placed restrictions upon her power of disposition of such property, and has required her to undergo a privy ex-

amination before a public officer, in order to validate her conveyance, *the restriction is for her benefit*, and proceeds upon the ground that as the husband is the head of the family, there is danger that her act may be induced by coercion. Some acknowledgement of this kind, from a married woman, is required in all of the United States under the control of common law jurisprudence.

"*But in none of the States, except Texas, does such provision extend to all of her property, or to the separate property of the wife.* In relation to this, she is considered as possessing the capacity of a *feme sole*, while in others, she is restricted in her transfers, and control over such property, to the specific mode pointed out by the deed or instrument by which it was vested in her.

"The statute which prescribes the mode of conveying the wife's property does not expressly declare absolutely void any other mode of conveyance. It seems, from its terms, to have had but one object in view, and that was to secure the freedom of will and action on the part of the married woman. If she was free to act, and so declared it, and that she did not wish to retract, all the circumstances concurred, which were made necessary by the law, to pass her title to the property."

The court held that the deed was admissible in evidence without any acknowledgment at all.

8 Tex., 413.

In *Dalton* vs. *Rust*, the court held the married woman who had received the consideration estopped from denying that she had never acknowledged the execution.

22 Tex., 133;

And also *Clayton* vs. *Fraser*, 33 Tex., 100.

In the case at bar, there is no complaint on the part of the husband and wife, ~~that~~ the objection is set up by a stranger who alleges no title in himself from either of them,

and who admits (R., p. 29) that the heir and her husband executed this deed to Hewetson.

We submit that the deed was not void, and should have been admitted in evidence.

The privy examination of the wife was actually had September 12, 1876. The trial was not had until March 1, 1877. p. 8.

One defendant having disclaimed as to a large amount, and the other as to all the demanded premises, and both having admitted possession of the premises at the time the suit was instituted, the plaintiff was entitled to judgment as to the premises disclaimed, and it was error to instruct for a general verdict in favor of defendants.

The judgment of the court below should be reversed.

P. PHILLIPS,
BETHEL COOPWOOD,
W. HALLETT PHILLIPS,
For Plaintiffs in Error.

OFFICE SUPREME COURT U. S.
FILED
MAR 17 1880
D. W. MIDDLETON, Clerk.

Supreme Court of the United States

OCTOBER TERM, 1879.

No. 217.

PHILADELPHIA BAR ASSOCIATION

THOMAS J. HOLLINGSWORTH

vs.

JOHN T. FLINT and D. T. CHAMBERLAIN.

BRIEF OF A. W. TERRELL,

For Defendant in Error.

MARCH 16, 1880

Thomas McGill & Co., Law Printers, Washington, D. C.

Supreme Court of the United States.

THOMAS J. HOLLINGSWORTH,
PLAINTIFF IN ERROR,

against

JOHN T. FLINT AND D. T. CHAMBERLAIN, DEFENDANTS IN ERROR.

From the Circuit Court of the United States for the Western District of Texas.

STATEMENT OF THE CASE.

We cannot adopt the statement of the case filed by the plaintiff in error. It is inaccurate in some respects, and does not sufficiently describe the instruments offered by him in evidence.

Thomas J. Hollingsworth, plaintiff in error, brought this suit December 12, 1874, in trespass to try title, against D. T. Chamberlain and John T. Flint, to recover eleven leagues of land contained in one survey, and situated on the San Andres (*a*) river, in the counties of Bell, Milam, and Williamson.

On the 2d of January, 1875, Flint filed a disclaimer of title to the whole grant. (Record, p. 3.)

Chamberlain, on January 8, 1875, filed a general de-

(*a*) This river, as stated in one of the deeds offered by plaintiff in error, (Record, p. 30,) is now known as Little River, a tributary of the Brazos.

murrer and the statutory plea of not guilty, (Record, p. 3,) and afterwards, on the 26th of January, 1876, by amendment, pleaded the statute of five and ten years' limitation. (Record, pp. 4, 5, 6.) By subsequent amendment of March 1, 1877, he filed a disclaimer of title as to several tracts of land, amounting in all to about nine thousand acres, embraced in the eleven leagues, which tracts are carefully described in the plea of disclaimer. (Record, pp. 6, 7.)

On the 1st of March, 1877, the cause coming on to be finally heard, the plaintiffs read in evidence, without objection, a *certified copy* from the general land office of Texas, of papers constituting a grant of the lands sued for, to Maguil Davila, with a translation of the same, (Record, pp. 12, 13, 14, 15, 16, 17,) viz:

1. Application to the mayor of Austin, (*b*,) dated October 2, 1833, by an attorney for Davila, for possession of eleven leagues of land on the San Andres River, "which the executive of the State did authorize him to purchase, under date of 13th July, 1830." Subject to the consent of Austin and Williams, (*c*,) (Record, pp. 13, 14.)

2. A reference to same to Austin and Williams, by Lessassier, the officer to whom it was addressed, dated October 3, 1833. (Record, p. 14.)

3. The consent to the act of possession given by Austin and Williams, dated also October 3, 1833. (Record, p. 14.)

4. Report of the surveyor, F. W. Johnson, to the commissioner, containing field-notes and map of the survey, describing the land as described in plaintiff's petition, without date. (Record, pp. 14, 15.)

5. Application of Maguil Davila, to purchase eleven

(*b*) San Felippe de Austin.
(*c*) The empressarios in whose colony the land was selected.

leagues of land, dated Leona Vicario, (*d*) July 10, 1830. (Record, pp. 15, 16.)

6. Consent to the purchase by Viesca, the governor, with his order to place Davila in possession and issue title to the land after it had been selected; the paper on which the former proceeding was based, dated July 13, 1830. (Record p. 16.)

7. Final title extended to Davila by Lessassier, the commissioner, on October 18, 1833, which shows by its language that all the foregoing had been incorporated in or protocolized with the final act. (Record, pp. 16, 17.)

Plaintiff then offered to read the testimonios of a notarial act executed by Filipe Barberna, regidor of Saltillo, dated May 7, 1839, which purported to convey from Davila to Don Santiago Hewitson "eleven leagues of land obtained from the public domain by virtue of a permit issued for them to him by the executive of the State of Coahuila and Texas, by order of July 13th, 1830, *which leagues are situate*, ten on the waters of the creek called Choctaw bayou of Red River, and the eleventh between the Sulphur Fork creek of Red River and the south fork of said creek, distant about twenty miles west of the road leading from Natchitoches to Kiamechi, of the same Red River, *the survey of which* is embodied in the patent issued at Angelina, jurisdiction of Nacogdoches, on the 30th of July, 1836, by Don Vinciente Aldrete, commissioner appointed for that purpose, which patent and order I certify to have seen, and that *I pass and deliver* to the aforesaid Hewiston." (Record, p. 22.)

In connection with this deed, and without objection by plaintiff, (Record, p. 23,) the court considered, as offered in evidence for the purpose of construing the deed, the following instrument, composed of several documents,

(*d*) Saltillo.

forming the expediente of title to Davila for the lands, thus carefully described as being on the waters of Red River, viz.:

1. Application of Maguil Davila for a grant of eleven leagues of land, dated Leona Micario, July 10th, 1830. (Record, p. 23.)

2. A "grant by sale" of eleven leagues of land to Maguil Davila, with direction for the commissioner to issue the corresponding title when the land should be selected, dated July 13, 1830. (Record, p. 24.)

3. A certificate showing that the foregoing was a copy of its original, ordered to be made by the governor, dated June 4th, 1874. (Record, p. 24.)

4. A power of attorney, dated May 17, 1834, executed by Maguil Davila to James Hewitson, authorizing him to "recover from the secretary's office" the certificates showing that eleven leagues of land had been conceded to him by purchase, to select under it the land from the public domain of the State, with full power to sell. (Record, pp. 24, 25.)

5. Appointment by Hewitson of M. B. Menard to act as his substitute attorney for Davila, dated June 5th, 1834. (Record, p. 25.)

6. Revocation by Hewitson of the power given to Menard, "the same having been without effect," and the appointment of John Cameron to act as Hewitson's substitute, under the power from Davila, dated May 24th, 1835. (Record, pp. 25, 26.)

7. Application of Cameron, as the agent of Davila, for extension to him of title to eleven leagues of land, surveyed by George Aldrich, reciting that "ten are situated on the waters of the Natchitoches Red River, including the creek called Choctaw bayou, and the other league is on the waters of the creek called Sulphur fork of the said Red River," dated Nacogdoches, January 10, 1836. (Record, p. 26.)

8. Act of Aldrete, the commissioner, declaring the presentation to him of Cameron's application, and ordering it and the concession, together with the surveys made by Aldrich, to be added to that act, "in order to proceed to do afterwards what may be convenient," dated January 30th, 1836. (Record, p. 26.)

9. Report to the commissioner of George Aldrich, the surveyor, of a survey of eleven leagues for Maguil Davila, with careful calls for courses, distances, streams, and corners, locating them in two surveys on the Choctaw bayou of Red River, and on the Sulphur fork of Red River, as described in the deed offered by plaintiff in error. This report dated November 3 and July 27, 1835. (Record, p. 27.)

10. Order of the Commissioner Aldrete for the issuing of the corresponding title, on Cameron's application for Davila, dated January 30, 1836. (Record, p. 27.)

11. Final title, issued to "Davila," for eleven leagues of land on Red River, the same surveyed by George Aldrich, reciting that the maps and field-notes thereof "are added to this dispatch;" and also that a copy of the concession of July 13, 1830, "heads this dispatch," dated Angelina, July 30, 1836. (Record, p. 28.)

12. A certificate of the translator in the General Land Office of Texas that the foregoing is a correct translation of a title to Maguil Davila for eleven leagues of land in the Spanish language on file in said office. (Record, p. 28.)

To the reading in evidence of the deed from Davila to Hewitson, thus considered without objection, in connection with all the papers of the expediente of title for the lands specially described as on Red River, the defendant objected on the ground that the deed did not convey the land on the San Andres or Little River sued for, and was therefore irrelevant and inadmissible. (Record, pp. 28, 29.) The objection was sustained and plaintiff excepted. (Record, p. 29.)

II. After reading an agreement of counsel that Maria Juez Davila was the daughter of Maguil Davila, the plaintiff offered to read in evidence a deed from her and her husband, Abato Valdez, to James Hewitson, dated September 28, 1869, in which, after reciting that her father did "many years ago" sell to James Hewitson his concession of eleven leagues of land issued on the 13th of July, 1830, which "was located, surveyed, and titled * * * on the waters of Little River, formerly known as the Rio San Andres;" and "whereas our said father, Maguil Davila, did, on the seventh day of May, 1839, by public act * * * convey said eleven (11) sitios of land to said Hewitson, *describing* said land by *mistake* as being situated in another part of Texas instead of where it is in fact situated," she and her husband proceed to "ratify and confirm" the sale of her father, and to "release, alienate, and convey" to Hewitson the San Andres River lands, "to have and to hold the same forever." (Record, p. 30.)

To the reading of this deed in evidence the defendant also objected, because it was the deed of a married woman, signed in 1869, when this suit was instituted in 1874, and the privy examination of the woman did not take place until 1876; that said deed was void when this suit was instituted, and had not passed the fee in the land mentioned therein; that until the privy acknowledgment the deed was a nullity, and that it was therefore inadmissible—which objection was sustained, the deed excluded, and the plaintiff excepted.

The statement of the plaintiff in error as to what transpired in the further progress of the cause, we approve.

BRIEF OF THE ARGUMENT.

I.

The first position assumed by the plaintiff in error on his first assignment of error cannot be maintained. The legal effect of the deed was a matter for the determination of the court, and not for the jury. (*Gardner* v. *Stell*, 34 Tex., 561.)

Even had the deed been permitted to go to the jury without objection as to its meaning, the court would not have been deprived of the right, nor exonerated from the duty, of expounding to the jury its legal interpretation. (*San Antonio* v. *Lewis*, 9 Tex., 69.)

Kingston *v.* Pickens, 46 Tex., only decides that, in a case of latent ambiguity, the deed should go to the jury with the evidence to explain it. Nor is Ragsdall *v.* Robinson, 48 Tex., 396, authority for plaintiff's position; for in that case it was held that the deed should have gone to the jury only because "we cannot say that the deed is void, or that it describes other and different land from that for which appellant sues."

We submit that there was no error in the ruling of the court excluding the deed from Maguil Davila to Hewitson dated May 7, 1839.

The position of the adversary is, that effect should be given to that general statement in the deed which refers to the permit and its date as the origin of one title, and that this should control the particular description of the land contained in the same instrument, and which refers to different surveys and a different title delivered to the purchaser.

It will be observed that the permission to purchase under which the eleven leagues on the San Andres or Little River were afterwards granted in October, 1833, was to Maguil Davila, and bears date at Leona Vicario, July 13, 1830.

On the next day a testimonio thereof issued, signed by Del Valle, the secretary. It will be seen also that on the 24th of June, 1834, a like testimonio issued of a permit bearing the same date, (July 13, 1830,) in favor of Maguil Davila, for the same quantity of land, which was located on the waters of the Red River, and to which also a title issued to Davila July 13, 1836. The first grant is conceded to be a valid grant; the last grant, it is claimed by plaintiff in error, was issued in violation of law and void. He seeks to construe the general language in the deed of May 7, 1839, from Davila to Hewitson, which refers to "eleven leagues of land obtained from the public domain by virtue of a permit issued for them to him, &c., by order of July 13, 1830," in such manner, as that it shall convey the eleven leagues first granted, and utterly disregards the particular description identifying the land covered by the last grant under a permit of the same date.

The language to receive construction is as follows, viz.: "Eleven leagues of land obtained from the public domain by virtue of a permit issued for them to him, by the Executive of the State of Coahuila and Texas, by order of July 13, 1830, which leagues are situate, *ten* on the waters of the creek called Choctaw of Red River, and the *eleventh* between the Sulphur fork of Red River and the south fork of said creek, distant about twenty miles west of the road leading from Nacogdoches to Kiamechi, of the same Red River, the survey of which is embodied in the patent* issued at Angelina, jurisdiction of Nacogdoches, on the 30th day of

*The word *titulo* has been here translated *patent*. It had in the land system of Mexico a more extended meaning, and included the entire expediente, which, with the final act (or title) of possession, constituted the *titulo* to land. This is apparent from the context, for it is said "the survey is embodied in the *titulo*." At civil law, *titulo* is interpreted the cause by virtue of which we possess a thing, and the instrument by which our right to it is accredited. (*Escreche*, p. 1503.) "Expediente" is defined, "the conjunction of all the papers corresponding to an object or business, in which sense we say, 'unite it

January, 1836, by Don Vinciente Aldrete, commissioner appointed for that purpose by the aforesaid Executive, which patent or order I certify to have seen and read, and I pass to and deliver to the aforesaid Hewitson." (Record, p. 22.)

The deed, it will be seen, was by authentic act, according to the forms of the civil law, executed by the regidor, Filipe Barbarena, acting as a notary, and was signed by both parties to the contract. (Record, p. 23.)

We submit that, whether this deed, executed in 1839, shall receive construction under the civil or the common law, the first inquiry which presents itself, under the rule of construction peculiar to either system, is: What lands, after looking to the words used in the deed, the papers referred to in it, and all the circumstances surrounding the parties, did Davila and Hewitson understand—the one that he was selling, and the other that he was buying?

The Republic of Texas on the 20th day of January, A. D. 1840, enacted the following law: "The common law of England, so far as it is not inconsistent with the Constitution or the acts of Congress now in force, shall, together with such acts, be the rule of decision in this republic, and shall continue in force until repealed." (*Laws of Tex., Pas. Dig., art.* 978.) At the adoption of the constitution of the republic in 1836, and until the passage of the act above quoted, the laws of Spain were the common law of the land, except as applicable to juries and evidence under the act of the constitution of the republic of December 20, 1836. (Gortaro *v.* Cantee, 7 Tex., 46.) That act was as follows:

"The common law of England as now practiced and

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to the expediente.' To form an expediente, is to unite or bring together all of the papers relating to a certain business." (*Escreche*, p. 662.) Thus it was, in Coahuila and Texas, the uniform custom to bind together in the protocol of a Spanish grant every paper evidencing the grant, from the application for permission to purchase to the final act of possession, and every testimonio of a grant regularly issued embraced the same.

understood shall, in its application to juries and evidence, be followed and practiced by the courts of this republic." (Laws of Tex., Pas. Dig., art. 3706.)

The deed to Hewitson, though made after this act, was a civil law conveyance by authentic act of an officer acting as notary. The rule is familiar, that the validity, interpretation, and obligation of contracts depend on the law of the country where the contract originated.

In 1839, the civil law prevailed in Texas, except as to evidence, and it would seem that a deed then drawn in accordance with the forms recognized at civil law should receive construction under that system. Words and phrases being used in a deed thus drawn, peculiar only to the civil law system of conveyancing, must have been used to convey such rights, and such only, as their use at civil law would import.

The doubt which may exist as to what rule of construction should be adopted in construing the deed from Davila of May 7, 1839, will excuse me for discussing the rules governing the interpretation of instruments under both systems of law.

In construing the deed, we are not restricted to a consideration of the language used in the instrument itself, but will insist that the *patent* (*titulo*) for the Red River lands issued by Don Vinciente Aldrete, which, according to a recitation in the deed, was referred to *for description*, and each paper constituting that title, must be looked to in interpreting the purpose of the contracting parties.

These papers were before the court (R., 23) to aid in the construction of the deed. They were considered by the court with the consent of the plaintiff, for the record discloses no objection, and he made none. They were not offered as evidence that they vested title in any one, but to show the acts of the parties concerning the Red River lands, to interpret their meaning, and to give a consistent construction to the deed.

The method of extending title in Tamaulipas, Coahuila, and Texas, was in its essential features identical. The interested party holding the testimonio of a permission to purchase was authorized to select and procure a survey and plat of the land, which was recorded in the office of an alcalde of the jurisdiction, and a duplicate thereof given to the party, attached to the original permit, as a history of the initial proceeding of his title. This was called an expediente, and was transmitted either to governor or, in some cases, to a commissioner, to extend title.

In either event, an alcalde or commissioner, under instructions, placed the applicant in possession. This being done, and the proceedings of the act of possession being written out and recorded, were attac
proceedings, which a[illegible] together, con
titulo or title to the land. Until the a
legal title did not vest. (State *v.* Sais, 47 Tex., 315.)

In the civil law we find no rule of interpretation which will warrant the construction of the deed claimed by the plaintiff in error.

Escreche, in the article on "Interpretacion de las Convencions ó Contractos," lays down the following rule, viz.: "General as may the terms in which the contract is made, they can never include other things than those that were thought about and which the parties to it proposed to obligate themselves." (Escreche, p. 928, clause 9.)

"In all contracts attention should be paid rather to the intention of the makers than to the literal meaning of the words." (Escreche, Verbo, Interpretacion de las Convencions ó Contractos.)

"The intention of the parties can be ascertained by taking into consideration the character of the business, the circumstances under which the contract was made, the motives which might reasonably have induced its execution, the acts of the parties subsequent to the contract, which had relation to the matter in dispute, by that which is most

in accordance with the custom of the contracting parties and of the country, and the words and meaning given to them *by him* (*a*) who spoke in the doubtful clause." (Escreche, p. 298.)

And again: "All the clauses of a contract shall be interpreted in the light of all the others, giving to each one of them that force which results from considering it in connection with all the rest." (*b*.)

It was held in Louisiana, before changes in the civil law made by statute, that in cases of doubt the conclusion must be "*in favorem salutionis*"—the obligation must be taken in the sense least onerous to the obligor. (Wagner *v.* Kenner, 2 R., (La. R.,) 122; Erwin *v.* Greene, 5 R., 75; Duncan *v.* Cevallo, 4 Martin La., 575.)

It is believed that the canons of construction in the civil law governing the interpretation of contracts harmonize in the main with our own system.

Words, whether used in contracts or on other occasions, seem not so much to be construed on the ground of an interpretation favorable or adverse as they formerly were. Rules of rigid or favorable construction were formerly resorted to as a primary source of interpretation. The recent and more reasonable practice is to give to language its true effect according to the intention of the speaker, or writer, as inferred from the whole expressions and the nature of the occasion to which it is applied.

The case of Cavazos *v.* Trevino, 35 Tex., 162, was affirmed on appeal by this court in an opinion by Mr. Justice Swayne. (6 Wall., 780.) In that case it was decided that in settling what has been granted, the quantity of land specified as well as the boundaries named, and the survey as made, are

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(*a*) This corresponds to the seventh rule for the interpretation of contracts as laid down by Pothier. (Pothier, 3d Am. ed., p. 153.)

(*b*) "Todas las clausulas del contrato le interpretaro, las unas per las otras, dando à cada una de ellas en Sentido que resulta de la totalidad de la escritura." (Escreche, p. 928.)

all to be considered, and by their united light the proper conclusion is to be reached. The practical interpretation which parties interested have by their conduct given to a written instrument in cases of an ancient grant, asked for and granted by general description, is always admitted as among the very best tests of the intention of the instrument. "In construing such a grant, the circumstances attendant at the time it was made are competent evidence for the purpose of placing the court in the same situation and giving it the same advantages for construing the papers which were possessed by the actors themselves." (Cavazos *v.* Trevino, 6 Wall., 787.)

This is in harmony with the decisions of Pennsylvania, where it is held that in construing a deed the court must look to the circumstances under which it was made for information regarding the intent of the parties. (Cox *v.* Tweedly, 33 Penn. St., 424; Miner's Appeal, 61 Id., 283.)

And the same court held that the acts and declarations of the parties may be considered in giving a construction to their agreement. (Colder *v.* Weaver, 7 Watts, 466; Foster *v.* McGraw, 64 Penn., 464; Muirhead *v.* Clabby, 7 Phila., 345.)

The whole deed must be considered, and to each clause and word must be assigned their rational, distinct meaning, if this can possibly be done. (Wharton *v.* Fisher, 2 S. & R., 178; Ludwig *v.* Leonard, 9 W. & S., 44.)

We submit, under the authority of the law to which we have referred, that the following facts, apparent on the face of the papers considered by the court, can be looked to in interpreting the intention of the parties, and that they show that the Red River surveys, and not the land sued for on the San Andres, were intended to be conveyed, viz.:

1st. The act of possession or final title for the San Andres river leagues, described in plaintiff's petition, was issued by the Commissioner Lessassier on the 18th day of October, 1833, at San Filippe de Austin; (Record, pp. 16, 17;) while

the final title to the eleven leagues, specially referred to in the excluded deed, was issued afterwards on January 30, 1836, by Vinciente Aldrete, a different commissioner, at Angelina, which fact is set forth in the excluded deed, and appears on the face of the *expediente* of the Red river lands, which was before the court. (Record, pp. 22–28.)

2d. While the final title to a Maguil Davila grant already put in evidence by plaintiff in error, described the land sued for as in *one* survey and on the waters of the San Andres river, (Record, p. 17,) the excluded deed designated by particular description land located in *two* surveys on the waters of a different stream, in a different colony, and more than two hundred miles distant from the San Andres river. (Record, p. 22.)

3d. The excluded deed refers in terms to a title issued "at Angelina, in the jurisdiction of Nacogdoches, 30th January, 1836," by Aldrete, which *patent* the officer who by authentic act executed the deed, certifies on the face thereof that he had seen and read, and that the surveys as described by him were embodied in the title (Record, p. 22) when the expediente for these surveys was before the court, and shows that they were made with careful locative and descriptive calls, and that the report of the surveyor, Aldrich, was embodied in the title. (Record, pp. 27, 28.)

4th. The negotiations which culminated in the excluded deed pertained to the *corpus* of land familiar alike to both parties. Hewitson had, on the 17th of May, 1834, received from Maguil Davila an irrevocable power of attorney authorizing him to obtain from the Secretary's office of the supreme government the certificate of permission to purchase, (long after a permit of same date and to one of the same name had merged in a title to the land sued for on the river San Andres,) and to select the land, take possession, and sell it, with power of substitution. (Record, pp. 24, 25.)

On June 4th, only a little over two weeks after that power of attorney was made, we find Padilla, the Secretary, issu-

ing a copy of an original permit, certifying that it was a copy, and that he had copied it by order of the Governor. (Record, p. 24.) On the very next day Hewitson created M. B. Menard his substitute "in all and for all," (Record, p. 25,) and on the 24th of May following he revoked his substitution, "the same having been without effect," (Record, pp. 25, 26,) and substituted John Cameron "in all and for all," who, as Hewiston's substitute, made the selection and procured actual surveys of the Red river leagues.

Thus Hewitson had been vigilant in his effort to procure a second survey and title under a copy of the permit of July 13, 1830, in so much that he had revoked the power of one substitute for not acting with vigilance in procuring the grant.

Every fact to which we have called attention will be found either in the deed or in the document referred to in the bill of exceptions as the "following instrument," (Record, p. 23,) which embraced all the documents evidencing the various acts necessary to a formal title under the laws of Mexico,—which, being bound together, constituted the expediente of the Red river surveys, and which was deposited in the General Land Office of Texas. (Record, p. 28.)

By the recitals of the deed, this title, thus constituted, became apart of it.

Thus, it further appeared that on the 27th of July, 1835, Cameron, as substitute for Hewitson, procured a survey of one league between the Sulphur fork of Red river and its south branch to be made by the Surveyor Aldrich, to begin on the southwest corner of a survey for Petrocio Tores, and from thence the survey, in all its lines, was carefully designated by courses, distances, streams, and corners. (Record, p. 27.) A little over two months thereafter, on November 3, 1835, Cameron procured a survey of the remaining ten leagues on the Choctaw bayou of Red river, and by the report of the surveyor this work was also done with corner

trees, courses, distances, and monuments carefully called for and designated. (Record, p. 27.) These surveys, as shown by the instrument submitted in connection with the deed, were embodied in the expediente, were attached to, referred to, and recognized in the final title as a part thereof; and Maguil Davila, not by attorney but in person, received the grant thus constituted, at Angelina, on the 30th of January, A. D. 1836, and was placed in possession of the Red river surveys thus selected by Hewitson's substitute. (Record, p. 28.)

When it is remembered that the claim to which plaintiff in error would give controlling effect, is but the beginning of a sentence which closes with a long particular description, there would seem to be force in the conclusion that the contracting parties referred to the permit rather as the origin of the right than descriptive of the property which the succeeding portion of the sentence described.

The reference to the permit of date July 13th, 1830, was at most but a descriptive clause, not intended to define the boundaries of the grant, but to individuate the subject, and this, by every rule of construction, cannot affect the more particular description of the premises contained in the deed. (Chapin *v.* Strodes, 7 Watts, 410.)

Again, the deed to Hewitson, after inserting the descriptive and locative calls of the Red River surveys by reference thereto, declares: 1. That the eleven leagues are free from mortgage. 2. That he warrants the same to the purchaser for two hundred dollars. 3. That they are worth no more, and he has found no one who will give him more. 4. The "patent" he certifies "to have seen and read"; that it was issued by Aldrete in 1836, and that the same "I pass to and deliver to Hewitson."

Thus the Red River surveys, which, by the express language of the final title, were ordered by Aldrete on January 30, 1836, to be incorporated in it, (Record, p. 28,) were delivered to Hewitson in person.

The title to the San Andres survey, already in evidence without objection, shows that twelve hundred dollars had been paid for it only three years before by Davila, besides the cost of surveying, (Record, p. 17,) and that could hardly have been the survey which he certified to Hewitson, the purchaser, was not worth more than a sixth of that sum.

Suppose the view should be adopted that the words "permit issued for them to him" should control, to the exclusion of all that is special in the further description of the land, the question arises—what permit? The original protocol, the authentic act itself, issued by Viesca July 13, 1830, could not have been intended; that remained, under the laws, in force as an original protocol in the office. The first original or testimonio delivered to the party interested could not have been intended, for, under the uniform custom of the country, its issuance was cotemporaneous with the date of the protocol. There can be but one answer. The parties understood those words to refer to the second testimonio of that permit, obtained by the vendee, Hewitson, himself, under the power given by Davila, May 17th, 1834, and which was before the court, and formed a part of the expediente of the Red River grant. (Record, p. 24.)

The "permit issued for them to him," under which the adversary would travel over Texas in search of land, was, as shown by the papers, the permit which Hewitson obtained under power from Davila to "recover" from the Secretary's office "the certificate already referred to," (Record, p. 24,) and the same under which he appointed Cameron as his substitute to select the land. That permit, whether valid or invalid, is, under every rule of construction, the one referred to in the general clause under consideration, and, thus interpreted, all the clauses and descriptions of the deed harmonize.

But we find on the face of one of the papers offered and excluded the further fact recited, that the San Andres River eleven league survey was also "located, surveyed,

and titled (Record, p. 30) *at the instance* of Hewitson." If this be true, he had been the active agent in procuring both grants, and after procuring the second selection to be surveyed and titled on the waters of Red River, (as the adversary insists in violation of law,) those claiming under him cannot fortify their theory of mistake in description behind his supposed ignorance of the *locus* of either survey.

We submit that no analogy can be found between this case and one in which the party sells his locative interest in land covered by a certificate owned by him. There, he has an inchoate right, which is the subject of sale, and until it merges in a patent his right attaches to the certificate, and a sale thereof will cover the land on which it may be floated or relocated.

In such case the contracting parties negotiate with regard to an unsatisfied demand against the State. Here the conveyance was of *land* to which title formal, at least, in all its parts, had issued. The permit to purchase was no longer the subject of sale, having merged in the title, and if the first testimonio was intended, it could only have been referred to as the origin of the supposed right of the vendor, and not as descriptive of the land bargained for and conveyed.

I concede the prohibition of uniting more than eleven leagues in the same hands (*a*), and that the political department of Texas, on March 17, 1836 (*b*), declared null and void all grants issued at the period when the final act of possession for the Red River survey bears date; but fail to see how either fact can, in the light of what appears on the

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(*a*) The Government may sell to Mexicans, and to them only, the lands they may solicit, taking care that more than eleven leagues are not united in the same hands, &c.

Decrees of Coahuila and Texas, No. 128, April 1, 1836.

(*b*) * * * It is hereby declared that all surveys and locations made since the act of the late consultation closing the land offices, and all titles made since that time, are null and void.

Const. of Texas of 1836, General Provisions, sec. 10; Paschal's Dig. of Laws of Texas, p. 37.

face of the papers, furnish a rule by which to interpret the motives or pervert and change the unambiguous and explicit description of the specific land attempted to be conveyed by the deed.

The fact that the parties negotiated with reference to eleven leagues, the title to which, containing the surveys, was issued in the jurisdiction of Nacogdoches and delivered to Davila, and which Hewitson, the purchaser, had been an active agent to procure, must surely negative a construction that would convey eleven leagues in the jurisdiction of Austin and Williams, in a distant portion of the State.

Under the authority of decisions which permit an interpretation of the instrument in view of the acts of the parties, we ask attention to evidence concerning all of those acts furnished by the excluded deed, and the papers considered with it.

While the deed was written in Mexico on the 7th May, 1839, the official character of the regidor, Barberano, who assumed to act as alcalde, and before whom it was executed, was not established to authorize its registration until more than twenty-nine years afterwards, to wit, June 1, 1868. (Record, p. 20.) (*a*) It was never deposited for record until

(*a*) Through inadvertence, doubtless, of the plaintiff in error, a rule of this court requiring translations to be made, was disregarded, in failing to print a translation of the certificate referred to. The omission I waive, and submit the following translation of the original Spanish, which is in the record, (Record, p. 20,) viz:

"Republic of Mexico,
Government of the State of Coahuila of Saragosa.

Victoriano Trepeda, the constitutional governor of the free and sovereign State of Coahuila of Saragosa—

I certify that C. Filipe Barberano, now deceased, by whom the foregoing document was made authentic, in the year 1839 exercised the functions of regidor of the ayuntamiento, and in that capacity discharged the duties of alcalde of the third, and in turn judge of the first instance of the court of the second district of this capital; that his signature is the same he was accustomed to use, and of this fact I give entire faith and credit in support of the same.

For the purposes above expressed, I extend this paper, at Saltillia, capital of the State of Coahuila and Saragosa, on the first day of the month of June, 1868.

(Signed) VICTORIANO TREPEDA.
I. SERAFIN FRAGOSO, (Srio.)

more than six years thereafter, to wit, June 24, 1874, (Record, p. 20,) which was thirty-five years after the date of its pretended execution; and this, as shown by proof made before the United States consul at Saltillo, was after the regidor and the assisting witnesses to the instrument were all dead. (Record, p. 21.) More than this, Hewitson himself was alive, as shown by agreement of counsel on file, during thirty-one years of this period; (Record, p. 33;) for he did not die until September, 1870, during all which period he seems to have taken no step to have the deed authenticated for registration. Davila also was alive during twenty-three years of this time, for his daughter declares in her deed that he did not die until 1862. (Record, p. 30.)

An armed invasion of Mexicans from across the border would be more tolerable than an invasion of titles like this, under such a rule of construction as is invoked by the adversary.

The singular silence observed by Hewitson during the thirty-one years which elapsed from the time when the deed bears date, is itself a circumstance (if the deed is genuine) showing that Hewitson himself knew it was intended to convey the Red river surveys, and that he regarded them worthless on account of the invalidity of the grant.

To hold that Davila and Hewitson, thus familiar with all the facts and negotiating about land, the *corpus* of which was equally known to both, intended, the one to sell and the other to purchase land which had been titled, in a distant portion of the State, in October, 1833, nearly two years before the incipient steps were taken by Hewitson, as Davila's agent, to procure a title for the land specially described and covered by the last grant, would, we respectfully insist, be to create a contract by construction, after the lapse of forty years, which was never contemplated by the parties.

We have thus far, under authority of Cavazos *v.* Tre-

vano, 6 Wall. and 35 Tex., and other cases, sought to interpret the meaning of the expressions used in the instrument, by examining the facts apparent in the deed, the papers considered in connection with it, and by the acts of the parties which preceded and followed its execution, also apparent from the record. If we restrict the investigation to the expressions used in the instrument itself, the authorities justify our interpretation.

The same parties made all the contract, and must be supposed to have had the same purpose in view in all of it. If this is more manifest in one part than another, that which is obscure may be illustrated in the light of that which is more clear and specific. (2 Parsons on Contracts, p. 501.)

Lord Ellenborough in Barton *v.* Fitzgerald (15 East, 541,) said: "It is a true rule of construction that the sense and meaning of the parties in any particular part of an instrument may be collected *ex anticedentibus et consequentibus;* every part of it may be brought into action to collect from the whole one uniform and consistent sense, if that may be done." This doctrine, so reasonable and just, is at variance with earlier authorities to the effect that, in construing a deed where there is apparent conflict of description, effect should be given to the first clause.

A commentator, in discussing this subject, uses the following language:

"The court cannot, however, through a desire that there should be a valid contract between the parties, undertake to reconcile conflicting and antagonistic expressions, of which the inconsistency is so great that the meaning of the parties is necessarily uncertain; nor where the language distinctly imports illegality, should they construe it in a different sense, for this would be to make a contract for the parties which they had not made themselves." (2 Parsons' Con., 505. See also Parkhurst *v.* Smith, Willes, 333.)

To the same effect is Jennings *v.* Brigardine, (44 Mo., 332,) in which it was said that when the will of the parties

is plain on the face of the instrument, courts should go no further in determining its meaning, though the words used should frustrate the grant itself.

The rule in Texas, as stated by its Supreme Court in Castro *v.* Illies, 13 Tex., 234, (*b*) is as follows: When the description of the thing intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate conveyed, no estate will pass except such as will agree in every particular of the description.

The facts of this case were as follows: Castro conveyed by mortgage deed to Illies forty thousand acres of land described as "in the State of Texas and county of Bexar," "*nearest adjacent to the town of Castroville*," "accruing from the concession granted by the government to said Henry Castro, being sections *surveyed by Charles de Martel*, deputy surveyor, and numbered and marked on the map deposited in the General Land Office," giving the numbers.

In foreclosing the mortgage, the lower court decreed the sale of lands not surveyed by Charles de Martel, and not corresponding to the numbers given, "first, because the same was within the colony and claimed or owned by Castro; and second, because, as to a part thereof, the same was in district No. 1, and was the land *nearest* to the town of Castroville." On this state of facts, the Supreme Court said:

"We understand the rule to be, as to a deed, that when the description of the thing intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate conveyed, no estate passes except such as will agree with every particular of the description." (Jackson *v.* Clark, 7 Johns. R., 217.)

"Besides the description by the expression nearest the town of Castroville, there was a description also by the number of the surveys in district No. 1, made by Charles

(*b*) The head-notes of this case will mislead. By looking to the opinion which states the case and the judgment, it will be seen that the point was directly involved.

de Martel, and we know from the pleadings and proof found in the record that the numbers of the survey embraced land which Castro and others were entitled to, and in the description the numbers of the survey must have been added to indicate those surveys nearest to Castroville, which was intended to be conveyed; consequently no estate can be said to have been embraced in the conveyances which, being nearest to Castroville, "were not also described by same numbers of survey set down in the conveyances." (Castro *v.* Illies, 13 Tex., 234; see also Jackson *v.* Rodgers, 7 Johns., 217; 3 A. Nash, 344; Hathaway *v.* Power, 6 Hill., 457.)

The case of Castro *v.* Illies was expressly approved in Cromwell *v.* Holliday, 34 Tex., 468, in which the court held that restrictive words in the latter part of a deed control the grant, and reaffirm in terms the doctrine that, "when the description of the land includes several particulars, no estate will pass except such as will agree with every particular of the description."

Such is the rule in Texas. In Phillips *v.* Ayers, 45 Tex., 605, Justice Moore, delivering the opinion of the court, said:

"Calls in grants, deeds, and surveys which serve to designate and identify land are divided into general, descriptive, and directory, or special and locative calls. The former, though the character of the object called for may be entitled to greater consideration, yet in view of the nature and purposes of the calls must yield to those for objects held to be of lower grade, in determining their relative importance, when such objects are referred to for the purpose of specific location and identity."

Here the permit was only descriptive of the origin of the title claimed, while the land was designated by locative calls and specific reference to surveys made, in which they were more carefully set forth.

The proposition that when there are two descriptions, one general and another particular and specific, the general will be controlled by the particular description, is sus-

tained by the following authorities: Gans *v.* Aldridge, 27 Indiana, 294; Loomis *v.* Johnson, 19 Johns., 448; Greenleaf's Cruise, Book 4, Vol. 2, 345; 3 Wash., 345, 346; Heurich *v.* Hopkins, 23 Maine, 220; 5 N. H., 536; 5 Mass., 413; Doe *v.* Gallaway, 27 Eng. Com. Law R., 30; [5 Barn & Adolph, Park, J.;] 1 Greenleaf's Ev., sec. 301.

The Supreme Court of Maine, in a case of conflict between a general and particular description of land, said: "It is a familiar principle that every call in the description of the premises in a deed must be answered, if it can be done. The intention of the parties is to be sought for by looking at the whole, and none is to be rejected if all the parts can stand consistently together. If, however, there be a precise and perfect description, showing that the parties *actually located the land on the earth*, and another which is general in its terms, and they cannot be reconciled, the latter may yield to the former." (Heurich *v.* Hopkins, 23 Maine, 19.)

The rule is well established, that when a deed refers to another for description, it is as if copied in it. (Foss *v.* Crisp, 20 Pick., 121; Allen *v.* Bates, 6 Pick., 460; 3 Wash., 367; Vance *v.* Fox, 24 Cal., 444.)

It was held in a carefully considered case, that where a deed described land by monuments, boundaries, and lines of other tracts, and then declares the description given is according to a survey theretofore made by a person named, such survey is incorporated into the deed and becomes a part of it, and the grantee acquires title only to the land contained in the exterior boundary of the survey. (Hudson *v.* Irwin, 50 Cal., 450.)

A reference to a plan is as effectual by way of estoppel as express words of a grant or covenant. (Baxter *v.* Arnold, 14 Mass., 577.)

In Mays *v.* Blount, 1 Iredell, (N. C.,) 283, it was held that the court had no right to strike out one part of a description more than another, "unless the part retained completely

fits the subject claimed and the rejected part does not, *and unless it further appears* that the whole description, including the part sought to be rejected, is applicable to no other thing. It must be shown, at least, to a degree of moral certainty, that there is a *corpus* that will answer the description in every particular." We insist that the Red River surveys answer the description as the parties understood it "in every particular." Whether they were legally granted by the government is not the question, since the grant was procured by the coöperative action of both vendor and vendee; and if they referred to the last testamonio of the permit, all the calls harmonize.

The case of Munson *v.* Davis, 20 Tex., 420, relied on in the court below, I respectfully submit is not in point. A bond for title made by Newson bound him to convey a tract of land "lying in the county of Gonzales, and Republic of Texas, on the *west* side of the Gaudalupe River, granted by the republic aforesaid to Thomas Casey, and by him transferred to said N. M. Newson." The evidence showed a patent to Casey for 1,280 acres of land, which described it as being on the *south* side of the Gaudalupe River. It will be seen from the head-notes of the reporter that the course of the Gaudalupe River in that county is north and south, with meanders from east to west. Properly speaking, there was no west side to the Gaudalupe River, and the other elements of description rendering the land easy of identification without repugnance in the calls, it was properly held, in effect, that the mistaken and impossible call was not material.

The case from California, in 3 Otto, 526, which rejects a call for a permanent monument to give effect to a deed, was when all the other calls were found correct and harmonized upon the ground, thus clearly demonstrating a mistake as to the one call. Indeed, in the very section of Greenleaf (vol. 1, sec. 301) which was cited by Mr. Justice Davis as authority for that decision, the rule as laid down

by Justice Parke, in Doe *v.* Galloway, (5 B. and Ad., 43–51,) is quoted with approval, viz.: "If the premises be described in general terms, and a particular description be added, the latter controls the former."

The authorities relied on by opposing counsel to establish the controlling force of the general description to identify the land conveyed do not sustain him. They are the following, viz.:

Boardman v. *Lessees of Reed*, 6 Peters, 345. There the grant called for land as located in one county, and the actual calls of the survey showed it to be in another. It was held that the call for the county might be explained either by showing that it was made by mistake, or that, under the circumstances existing at the time of the survey, it was not inconsistent with the calls of the survey. Thus the actual survey controlled.

Worthington v. *Hylyer*, 4 Mass., p. 205, decides in terms that when the description includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass except such as will agree with every particular of the description.

Lyman v. *Loomis*, 5 N. H., 415, is also an authority against the principle for which it is cited. There the locality of the granted premises was fixed in opposition to a general description, by reference to a particular description contained in another deed to which the instrument referred.

Lush v. *Druse*, 4 Wend. There the granted premises were described, not only by patent, but by the *number* of the lot, and the error was made in giving its metes and bounds. The purchaser entered on the lot the number of which was given, and after occupying it thirty-six years, it was held that the number of the lot and patent being correctly given, the title passed. Had nearly forty years elapsed, as in this case, before the assertion of the right, some authority would have been found for a different construction.

Rutherford v. *Tracy*, 48 Mo., 325. The deed conveyed

the whole of a lot in a designated block, and then by metes and bounds limited the conveyance. But the grantee showed the purchaser the wrong lines, who acted on the information, built a house, and it was held that having led his vendee into a line of conduct prejudicial to him, he should not afterwards be heard to allege anything to the contrary.

Mason v. *Russell's Heirs*, 1 Tex., cited to show that a void grant cannot be interposed as an impediment in the assertion of a right. We admit the principle, but deny its application. Here, the Red river surveys were not offered to show title, but to show the *corpus* of land described and referred to in the deed, the intention of the parties, and thus negative the idea of mistake in the call for them.

Early v. *Sterrett*, 18 Tex., 115, and *Berry* v. *Wright*, 14 Tex., 273, we do not think apply. If they do, they must yield to the later case of Cromwell *v.* Holliday, 34 Tex., 468.

Jackson v. *Marsh*, 6 Cowen. A case of repugnant calls, in which it was held that one call in a patent should be rejected as surplusage, because it conflicted with a map and survey of the granted premises actually made and recorded. We only ask equal respect for the actual survey to which the excluded deed refers.

We submit that, whether the deed be construed with reference to its terms alone, or in the light of what appears from the record, showing the acts of the parties before its execution and their conduct afterwards, to give effect to a portion of a sentence descriptive of the origin of the pretended title, and disregard all the rest of the same sentence, which locates and identifies the *corpus* of the land, and shows when and how it was surveyed, would be to make a contract for the parties at variance with their intention when the deed was made.

II.

There was no error in excluding the deed from Maria Inez Davila of date September 28, 1869.

The excluded deed from Maria Inez Davila shows upon its face that it was a release and conveyance of land, the legal title to which, it was claimed, descended to her, and which she declared her father once intended to convey, but described other lands through *mistake*. (Record, pp. 30, 31.) The deed shows that she was a married woman. (Record, p. 30.)

It is objected that the instrument excluded was not a conveyance of land, the separate property of the wife, but a confirmation of an estate previously created. If the legal title to the estate had been previously granted to Davila by her father, the introduction of the deed from Maria Inez Davila was a useless ceremony. If, on the contrary, as the deed recites, it "released, aliened, and *conveyed* (Record, p. 30) land which her father once attempted to convey, but described, by mistake, as being in another part of Texas, instead of where it is in fact situated," (Record, p. 30,) then its introduction could serve a practical purpose; for, the legal title having descended to her, the purpose of the deed was to unite it with the equitable title, in another.

The deed offered was not acknowledged, as required by law, to pass the interest of the grantor under coverture until September 12th, 1876. (Record, p. 32.)

This suit was instituted December 1, 1874, nearly two years before the acknowledgment, and no amendment of pleading was made after the acknowledgment was perfected.

The Constitution of Texas adopted August 27, 1845, contained the following provision, which continued in force the rights of women under the laws of Mexico:

"ART. VII. Sec. 19. All property, both real and personal, of the wife, owned and claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property," &c. (Paschal's Dig., 4th ed., vol. 1, p. 64.)

The common law of England adopted January 20, 1840, was adopted, according to its terms, "only so far as it is not inconsistent with the Constitution or acts of Congress now in force." (Paschal's Dig., 4th ed., vol. 1, art. 978.)

On the same day, the Congress of the Republic of Texas passed the following law:

"That neither the lands nor slaves which the wife may own, or to which she may have any right, title, or claim at the time of her marriage, nor the lands or slaves to which she may acquire during the coverture any right, title, or claim, by gift, devise, or descent, nor the increase of such slaves in each case, nor the paraphernalia, as defined at common law, which the wife may have at the time of marriage, or which she may acquire during coverture, as aforesaid, shall, by virtue of the marriage, become the property of the husband, but shall remain the separate property of the wife." (Hartley's Dig. of Laws of Texas, p. 734, art. 2409; see, also, De Blanc *v.* Lynch, 23 Tex., 27.)

The next enactment on the subject was that of March 13, 1848, as follows:

"Article 4641, [2402.] * * * [2.] All property, both real and personal, of the wife, owned and claimed by her before marriage, and that acquired afterwards by gift, devise, or *descent*, as also the increase of all lands and slaves thus acquired, shall be the separate property of the wife." (Paschal's Dig., 4th ed., vol. 1, pp. 475–6.)

The Constitution of 1869, article XII, section 14, provided: "The rights of married women to their separate property, real and personal, and the increase of the same, shall be protected by law." (Paschal's Dig., 4th ed., vol. 1, p. 1124.) Thus the laws of Spain and Mexico defining the separate property of the wife were continued in force in

Texas up to the date of the deed of Maria Inez Davila, and still remain in force.

The statute governing the mode of conveying the separate property of the wife in force since April 30, 1846, is as follows:

"Article 1003. [174.] [1.] That when a husband and his wife have signed and sealed any deed or writing purporting to be a conveyance of any estate or interest in any land, slave or slaves, or other effects the separate property of the wife, or of the homestead of the family, or other property exempted by law from execution, if the wife appear before any judge of the Supreme or District Court, or notary public, and being privily examined by such officer, apart from her husband, shall declare that she did freely and willingly sign and seal the said writing, to be shown and explained to her, and wishes not to retract it, and shall acknowledge the said deed or writing so again shown to her to be her act, thereupon said judge or notary shall certify such privy examination, acknowledgment, or declaration, under his hand and seal, by a certificate annexed to said writing, to the following effect or substance, viz.:

"STATE OF TEXAS, }
County of ———. }

"Before me, —— ——, judge of, or notary public of —— county, personally appeared —— ——, wife of —— ——, parties to a certain deed or writing bearing date on the —— day of ——, and hereto annexed, and having been examined by me privily and apart from husband, and having the same fully explained to her, she, the said —— ——, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it. To certify which I hereto sign my name and affix my seal the —— day of ——, A D. ——. —— ———. [SEAL.]

"But any certificate showing that the requisites of the law have been complied with, shall be as valid as the form here prescribed; and such deed or conveyance, so certified, shall pass all the right, title, and interest which the husband and wife, or either of them, have or may have in or to the property therein conveyed." (Paschal's Dig., 4th ed., vol. 1, art. 1003.)

This provision of the law designed for the protection of married women, in the conveyance of their interests or titles, has always, in Texas, been strictly construed to effect that object.

The signature of Maria Inez Davila was a nullity, and as to her, the deed was absolutely void until September 12, 1876, when it was properly acknowledged by her. (R., 32.) Berry *v.* Donley, 26 Tex., 745; Cross *v.* Evarts, 532; Smith *v.* Elliott, 39 Tex., 210; Looney *v.* Adamson, 48 Tex., 621; Thompson *v.* Philps, 6 Dana, 390; Perry *v.* Calhoun, 8 Humph., 556; Bern *v.* Randall, 23 Ala., 514; Ray *v.* Bremond, 22 Tex., 628; Lessee *v.* Zercher, 12 Ohio, 364; 2 Woods, 153.)

It cannot be said that the acknowledgment rela[illegible] he to the date of the deed. There can be relation b[illegible] .he void acts, and this as to acknowledgments. (Doe *v.* [illegible] ner land, 8 Cowen, 277.) In this case Chief Justice Savage said: "In all cases where a subsequent act is held to relate back to a thing antecedent, there must be *something* to which relation may be had; something inchoate—imperfect; but yet something. I hazard nothing in the assertion that in no case was relation had to a void act." (*Id.*, 285.)

The case of Dalton *v.* Rust, 22 Tex., 134, relied on by plaintiff, only shows that a married woman may sometimes be estopped from questioning a sale not properly acknowledged by her, where there has been the action of a court of competent jurisdiction, and she had received the purchase-money.

Clayton *v.* Frasier, 33 Tex., 100, also cited by plaintiff, only holds that relief may in some cases be afforded in *equity* sustaining a married woman's deed, executed without a privy examination.

Equally pointed was the language of the court in Jackson *v.* Stephens, 16 Johns., 110–113, where Spencer, Justice, said: "She was not confirming an inchoate and imperfect right. The deed took its efficacy from the period of her

acknowledgment, and there was nothing prior to which it could relate." (See also 2 Sand. Ch., 533–566; *Id.*, 311.)

Thus the excluded deed from Maria Inez Davila was her deed only from and after the date of her valid acknowledgment, to wit, September 12, 1876. (R., 32.) This was after suit brought, to wit, December 12, 1874; (Record p. 1;) and after the alleged date of eviction, to wit, October 31, 1873; (Record p. 2;) and after the date when plaintiff alleged title in himself, to wit, 18th September, 1872. (Record, p. 1.)

An after-acquired title was not admissible. The status of the title at the institution of the suit was the issue. In *Bradford* v. *Hamilton*, 7 *Tex.*, 58, Judge Wheeler said: "There was no evidence that the plaintiff had any right whatever at the time of bringing this action, and it is quite too clear for argument that he could not maintain a suit, commenced without any color of title, by evidence of a title acquired subsequently."

In *Simpson* v. *McLaman*, 8 *Tex.*, 450, the same court held, in an action putting in contestation the title to land, that the plaintiff "must show title in himself *at the time* the suit was instituted."

In a still later case Chief Justice Hemphill said: "The title at the time of the commencement of the action is the question to be tried. If that be good the plaintiff is entitled, as a general rule, to recover, and if he had assigned or transferred his interest in the meantime, it would seem, on the general principles of law in relation to the effect of a conveyance by either party pending the suit, that the plaintiff would still be entitled to recover, inuring to the benefit of the vendee. On the other hand, if he did not prove a good title at the commencement of the action, his vendee would be bound by the judgment for the defendant."

Directly in point and to the same effect, is *McCook* v. *Smith*, 1 *Black*, (U. S. R.,) 459. In that case Justice Swayne

said: "The rule of the common law is inflexible, that a party can recover in ejectment only upon a title which subsisted in him at the time of the commencement of the suit." (21 Howard, 451; Tyler, 76; Adams, 33–211.)

We will be excused for calling attention to the fact that this deed from Maria Inez Davila, in referring to the excluded deed from Davila to Hewitson, recites the fact that Maguil Davila's deed described "said land by mistake at being situated in *another part of Texas*, instead of where it is in fact situated." We scarcely know which most to admire—the frankness with which the heir gave and the plaintiff received a deed which thus confessed the correctness of our construction of the locus of the land conveyed by the Hewitson deed, or the wonderful honesty which, after the lapse of over thirty years, would correct a mistake of her father, about which she could know nothing. But when we find that this same deed empowers an attorney to prosecute or compromise suits in a United States court, in the name of her dead father, we bow before the genius of the scrivener who in one instrument could cause a Mexican girl beyond the Rio Grande to provide for the recovery of fifty thousand acres of Texas land in that father's name, and at the same time declare that he had been divested of all interest for thirty years.

III.

There was no error in excluding the deed from those who represented themselves as heirs of James Hewitson, and as such executed the deed of September 18, 1873. (Record, pp. 33–34.)

The plaintiff in error filed with his petition his title papers, giving defendant notice thereof, and all had been read or offered except this deed. (Record, p. 2.) As shown by the bill of exceptions, he declined to state that he expected to connect himself with the sovereignty of the soil in any other manner than that already attempted, or that he ex-

pected to show any other title than that already offered. (R., 36.) The right to begin with any link in one's chain of title is always conceded, but we know of no instance where it has been permitted, when counsel *declines* to state that he expects to show a connection between the sovereignty of the soil and the vendor in the deed offered. Any other rule would leave the time of the court subject to be controlled by the caprice of counsel.

IV.

There was no error in directing the jury to find a verdict for the defendants.

The disclaimer filed by Flint as to all the land sued for, and by Chamberlain as to a portion of it, gave the plaintiff no right to a judgment for the premises disclaimed, when he exhibited no evidence of title in himself. In the action of trespass to try title, plaintiff must recover, if at all, on the strength of his own title, and not upon the weakness or want of title in the defendant in possession.

"The plaintiff, in order to entitle himself to recover as against a naked possessor, must show that he is the absolute owner of the land in controversy, not only as against the defendant, but as against all other persons."

Hooper *v.* Hall, 35 Tex., pp. 83–84.

Even if the plaintiff were entitled to a verdict as to the premises disclaimed, it would not entitle him to a reversal, for the metes and bounds of the premises being in the plea incorporated in the record, (p. 37,) this court would reform the judgment. Such also is the practice in Texas. (Castro *v.* Illies, 13 Tex., 235–236; McNary *v.* Castleberry, 6 Tex., 286; Mathews *v.* Hancock, 20 Tex., 7; Johnson *v.* McKissack, 20 Tex., 161.)

A. W. Terrell,

OFFICE SUPREME COURT U. S.
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Supreme Court of United States.

HOLLINGSWORTH
vs.
FLINT ET AL. } 217.

Brief in Reply to Mr. Terrill.

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FLINT ET AL. } 217.

Brief in Reply to Mr. Terrill.

It is attempted to be shown that Hewetson was instrumental in obtaining the location of the land on Red River. If the papers relating to this land can be considered as properly part of the bill of exceptions, it will be seen, by reference to the power of attorney of Davila to Hewetson, May 17, 1834, p. 24 R., how far he was an actor. It recites:

"That Davila having presented himself to the supreme government of the State, soliciting vacant land, in the year 1830, and having been conceded to him eleven leagues of the same by purchase according to the colonization law, his petition and the dispatch relating thereto, for not having taken out the certificate corresponding to the same, and wishing to make use of the rights which it gives, he confers all his power to Hewetson, that he may, in the name of the grantor, recover of the secretary's office the certificate already referred to, and, after having the same in his possession, he may select of the public domain of the State the point or points where the leagues of land which, as he has proved, as he knows, have been conceded to him in the same year of 1830, receiving them at the point where it may suit him best."

The substance of this instrument is, that Davila, not having sued out the certificate corresponding to the land conceded to him, he authorizes Hewetson to obtain the certificate and to select the points where the leagues of land, as he knows, have been conceded to him.

This instrument was executed 17th May, 1834. On June the 5th, 1834, Hewetson, never having executed the rights vested by the instrument, devolved all his powers on Menard. p. 25.

It thus appears that Hewetson was no party in obtaining the void location of the land on Red river, particularly mentioned in the deed of Davila to Hewetson.

That deed conveys in fee simple forever, "to wit, eleven leagues of land obtained from the public domain by virtue of a permit issued for them to him by the executive of the State of Coahuila and Texas, by order of July 13th, 1830;" and, after the reference to the papers of January 30th, 1836, and waiver of time for rescission on account of fraud, etc., declaring there was none in this instance, Davila adds as follows: "That from this time forward, forever, he concedes and divests himself of the right, title, and dominion over the *eleven leagues of land that he has acquired*, and conveys and transfers *all of it* in favor of the purchaser," etc., * * * "without any limitation whatever," etc.

Does such language, construed with all that is said about the Red River surveys, possibly admit of an interpretation limiting the deed to only such land as was *never acquired*, and excluding from its effect "all he had obtained from the public domain?" How could he divest himself of title to and dominion over land he never obtained or owned, when the very words of the deed show he did not obtain it?

"When a clause presents two meanings, one consistent with and the other contrary to its validity, it ought to be construed according to that meaning which will give it effect—because it is not to be presumed that two persons endowed with reason could have desired to stipulate useless things."

Interpretacion de las Convenciones y Contratas, Escriche, Vol. 2.

Conveying all the eleven leagues he had acquired, clearly indicated, to both parties, the estate granted. If Davila had not intended to convey the eleven leagues he had actually so obtained, would he have signed a deed saying he conveyed "*all of it*," when it appears that he had then obtained the demanded premises by virtue of the decree? It is difficult to see how there could have existed a doubt between the parties to the deed—that whatever land had been acquired lawfully was conveyed. This surely is the conclusion, unless the language used admits of a construction that it was not "all of the eleven leagues which he had obtained," but all he *never had* acquired, and never had any right to obtain or convey. A construction of the language that would have such an effect is not, in our conception, admissible. The language literally declares that the grantor conveys all the eleven leagues of land he had acquired by virtue of the executive decree, and that its field-notes are contained in the papers purporting to have been issued on the 30th of January, 1836. The latter statement proves to have been erroneous, and, so far as it is so, and does not relate to or describe lands actually obtained from the public domain, it is to be rejected and disregarded; and the rules of construction appear to be in accordance with this view of the case.

Field vs. *Huston*, 21 Me., 71 to 73.

In the case last cited, SHEPLEY, J., after citing the

rule, "that every man's grant shall be taken most forcibly against himself," refers approvingly to the case stated from 2 Rol., 193, C. 10, "of a grant of all lands in L., followed by a grant of the rectory of L., where there were two rectories in L.; and it was held that all the lands passed, including both rectories." And he cites from Com. Dig. Grant, E. 12, that "if one grant his manor of D., in the county of N., and all his lands in England, parcel of the same manor, all the lands that are parcel of the manor will pass, though not in the county of N."

For similar reasons, all lands that are part or parcel of the eleven leagues acquired by virtue of the decree will pass, though not on Red River.

The general words granting the eleven leagues, obtained by virtue of the permit, are not used to designate the situation or place where the estate is to be found, but to designate what is conveyed, while those contended for by defendants, as restrictive, are only used to designate where the leagues will be found. "*Las evales sitios se hayan*," may be literally rendered, *which leagues are found*, or more literally, *find themselves*, etc.; and it clearly appears from the translation in the record that all of that part of the sentence or clause following the words 13th of July, 1830, was used and only intended as a designation of where the leagues will be found, and, therefore, should not frustrate the grant.

It will be readily observed that the cases cited by defendant in support of the rule regarding the inclusion of several particulars, all of which are necessary to ascertain the estate conveyed, are not analogous to the one at bar.

While we have no doubt about the common law, in its application to such evidence, being required to be followed and practiced in cases like this, ever since the act of December 20, 1836, yet we are not inclined to believe there is any material difference between it and the civil law of

Spain and Mexico touching such instruments of evidence. Among the rules of the latter law will be found the following:

"If the doubtful clause can have effect as well under the construction given to it by one of the parties as under that given to it by the other, it should be given that construction which comes nearest the truth and justice," * * * * "not being able to ascertain the truth in this manner, the obscure words should be interpreted against him who spoke or used them, and in favor of the other party."

"Terms susceptible of two meanings ought to be taken with that which most accords with the nature of the subject-matter of the contract."

"If the doubts cannot be determined by the means indicated, they should be decided against the stipulator and in favor of the debtor."

"This rule is more particularly applicable to unilateral contracts and those lucrative and beneficial." * * * * "Thus it is that in sales and leases every obscure or ambiguous contract shall be interpreted *against the vendor* or *lessor*, because the vendee or lessee is considered as the principal debtor, as well as because the vendor or lessor should have expressed himself with more perspicuity." [This shows the misapplication made by defendant of the rule in favor of the obligor.]

"The doubt ought to be explained against the person who expressed himself or stipulated obscurely in the contract, and in favor of the other." (Conclusion of Law, 2 tit. 33, part 7.)

Escriche, vol. 2, pp. 228 to 230, verbo Interpretacion de las Convenciones y Contratos.

Defendants do not contend that there ~~were~~ was more than one executive decree or concession to Davila, but they claim, as there appears, to have been two copies issued at different times—the void copy must have been intended by the grant of the land obtained by the decree. If this were the intention, why convey the land obtained by virtue of the executive decree of 1830? Why not say in the deed

the eleven leagues attempted to be obtained by virtue of a subsequent copy issued in 1834?

The public archives then in the General Land Office were the touchstone to show precisely what land had been obtained from the public domain by virtue of such executive decrees or concessions; and the grants so obtained were as well known by the name of the grantee in the primitive title as were the manors of England by their proper names; and a grant of the land obtained from the public domain by virtue of a certain executive order or concession, describing it by the date, quantity and name of grantee, is as fully capable of identifying the land conveyed, as if it conveyed the manor of D. in England, or as if it conveyed all the land acquired in Kansas by virtue of a bounty warrant for one hundred and sixty acres, issued by the United States on a certain day to the grantor in the deed.

It is respectfully submitted that the case at bar *is not one* in which the rule in *Castro* vs. *Illies*, (13 Texas, 334,) applies; for the particulars, for which defendants claim precedence are not necessary to ascertain the eleven leagues so acquired and conveyed, nor are they at all consistent with the granting part of the deed. They show upon their face that they do not describe or relate to any land that was ever acquired by Davila from the public domain.

Notwithstanding defendants claim for the papers produced by them for the consideration of the court, the dignity of a grant, or second grant. They admit "they were not offered as evidence that they vested title in any one;" and it is respectfully submitted that they were mere private papers, purporting to be copies of originals which could not be admissible in evidence.

It is a well established rule that the special commissioner's authority should be strictly construed.

White vs. *DeLeon*, Texas,

In these special commissioner's papers, produced by defendants, we will hunt in vain for any authority whatever for him to act.

The rule, "that every call in the description of the premises in a deed must be answered, *if it can be done*," is fully answered by the fact that the Aldrete papers describe no part of the land he (Davila) had acquired, and which constitutes the granted premises in the deed.

It is said (page 10) that this void instrument being referred to in the deed can be looked to as showing what was intended to be conveyed and becomes part of it, (15.) This principle, we contend, is applicable to the title-papers to the land sued for, inasmuch as the deed refers to them when it conveys the eleven leagues obtained by virtue of the permit; and plaintiff shows that the eleven leagues sued for is the only land so obtained. They must be read as incorporated in the deed.

On page 26 it is said that the singular silence of Hewetson during thirty-five years which elapsed from the time the deed bears date shows Hewetson knew it was intended to convey the Red River surveys.

In answer to this we may say it is somewhat singular that if it was the latter which was conveyed, why did not Davila claim the demanded premises? Moreover, it nowhere appears that Hewetson ever went into possession or made any claim to the land on Red River.

We submit that defendant has not overcome our position that the deed of Maria Inez Davila and her husband was not a nullity, and should have been admitted in evidence.

The validity of the deed depends entirely upon the construction given by the highest court of Texas, to Art. 1003, Pasch. Dig. Laws, governing the mode of conveying the separate property of the wife.

The authorities cited from other States have no bearing and need not be considered.

The Texas cases cited to show the nullity of the deed in no wise overrule those previously cited by us. We call the attention of the court particularly to *Clayton's Adm'r* vs. *Fraser*, decided in 1870. Here the title-bond was signed by Mrs. Clayton, and on suit by the vendee for specific performance the petition was demurred to on the ground that the bond showed no privy examination of the wife. This demurrer was overruled, and the cases of Womack and Dalton cited as conclusive of the point. *Clayton* vs. *Fraser*, 33 T., 100. The court quotes the first case with approbation, as holding that the statute does not expressly declare absolutely void any other mode of conveyance.

Where the contest arises between the wife and the party claiming under her deed, or when it is sought to sustain the conveyance of the homestead, different considerations arise.

The constitution and laws of Texas have so hedged in a homestead from sale that courts are required to scrutinize very closely to see that all the statutory provisions have been fully complied with before they will pronounce a sale valid.

Boatright vs. *Peck*, 39 T., 204.

In the case at bar the sole object of the statute has been satisfied by a full and complete acknowledgment, and privy examination of the wife, and between the date of the deed and such privy examination no new rights have been acquired by other parties.

We submit, therefore, the deed should have been admitted, and the judgment should be reversed.

P. PHILLIPS,
BETHEL COOPWOOD,
W. HALLETT PHILLIPS.
for Plaintiffs in Error.